Notre Dame Law Review

Volume 61 | Issue 2 Article 2

1-1-1986

Retroactive Regulatory Interpretations: An Analysis of Judicial Responses

Russell L. Weaver

Retroactive Regulatory Interpretations: An Analysis of Judicial Responses

*Russell L. Weaver**

Retroactive laws[1] present special problems for a legal system because they can upset settled expectations,[2] and can deprive citizens of notice of, and an opportunity to comply with, legal require-

* Assistant Professor of Law, University of Louisville; B.A., 1974, J.D., 1978, University of Missouri.

1 Laws can be retroactive in several different respects. Munzer, in his article on retroactive legislation, defines retroactivity in the following way:

> The phrase "retroactive legislation" as used here covers two groups of statutes and has an intimate connection with a third group. The main group consists of laws that alter the legal status, that is, the legal character or consequences, of some pre-enactment action or event. Such laws form the core of what people usually understand as retroactive legislation and may be called retroactive in the strict sense. Examples include a statute making criminal an act that was legal when performed, or a curative act making valid a contract or marriage that suffered from some technical flaw. The second group consists of laws that do not affect the pre-enactment status of an action but makes a legal judgment regarding that action easier or harder to obtain. An illustration is a statute, passed after an offense but before trial, that alters the rules of evidence to make it easier for the state to obtain a conviction. Courts often view such statutes as involving retroactivity. The final group consists of laws that do not alter the pre-enactment status of an action but substantially affect expectations stemming from that action. For instance, a tax statute might change the method of depreciating rental property. Even if the change applied only from the date of enactment, it might disrupt the expectations of someone who purchased a rental building and planned under then-existing laws to depreciate the building more rapidly.

Munzer, *A Theory of Retroactive Legislation*, 61 TEX. L. REV. 425, 426 (1982). The term "retroactive interpretations," as used in this article, refers to interpretations that fit within Munzer's first category, ones that "alter the legal status . . . of some [prior] action or event." *Id.*

2 *See, e.g.*, Daughters of Miriam Center for the Aged v. Mathews, 590 F.2d 1250, 1260 (3d Cir. 1978) ("Retroactive laws interfere with the legally-induced settled expectations of private parties to a greater extent than do prospective enactments."); Adams Nursing Home of Williamstown, Inc. v. Mathews, 548 F.2d 1077, 1080 (1st Cir. 1977); Leedom v. International Bhd. of Elec. Workers, Local 108, 278 F.2d 237, 240 (D.C. Cir. 1960) ("The vice inherent in retroactivity is, of course, that it tends to destroy predictability and to undercut reliance—both important aims of the law."); Local 719, Int'l. Prod., Serv. & Sales Employees Union v. McLeod, 183 F. Supp. 790, 793 (E.D.N.Y. 1960). *See* Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 HARV. L. REV. 692 (1960) ("Perhaps the most fundamental reason why retroactive legislation is suspect stems from the principle that a person should be able to plan his conduct with reasonable certainty . . . ."); Munzer, *supra* note 1, at 425; C. SANDS, SUTHERLAND STATUTORY CONSTRUCTION § 41.05, at 261 (4th ed. 1972):

> One of the fundamental considerations of fairness recognized in every legal system is that settled expectations honestly arrived at with respect to substantial interests ought not to be defeated. There is evidence that results achieved through application of judicial instinct, manifested in the pattern of decisions on retroactivity problems, are perhaps best explainable in terms of this fundamental principle of justice.

ments.[3] Hostility towards retroactive laws is reflected in the ex post facto clause of the United States Constitution, which prohibits Congress and the states from passing retroactive criminal laws,[4] and in

---

See also Comment, *Prospective Overruling and Retroactive Application in the Federal Courts*, 71 YALE L.J. 907, 945 (1962) [hereinafter cited as *Prospective Overruling*].

3 *See* Munzer, *supra* note 1, at 426-27. He notes that:

> The central purpose of law is to guide behavior. When legislatures create rules, a person properly forms expectations about how the legal system will respond to his actions. Retroactive laws frustrate the central purpose of law by disrupting expectations and actions taken in reliance on them. This disruption is always costly and rarely defensible. Moreover, retroactive lawmaking violates what is often called the rule of law, namely, an entitlement of persons to guide their behavior by impartial rules that are publicly fixed in advance. This violation undermines human autonomy by hindering the ability of persons to form plans and carry them out with due regard for the rights of others.

See also Munzer, *Retroactive Law*, 6 J. LEGAL STUD. 373, 391 (1977) ("[A] person is morally entitled to know in advance what legal character and consequences his acts have."); C. SANDS, *supra* note 2, § 41.02, at 247:

> It is a fundamental principle of jurisprudence that retroactive application of new laws involves a high risk of being unfair. There is general consensus among all people that notice or warning of the rules that are to be applied to determine their affairs should be given in advance of the actions whose effects are to be judged by them.

4 U.S. CONST. art. 1, § 9, cl. 3 ("No Bill of Attainder or ex post facto Law shall be passed."); U.S. CONST. art. 1, § 10, cl. 1 ("No state shall . . . pass any Bill of Attainder, ex post facto Law . . . ."). *See, e.g.*, C. SANDS, *supra* note 2, § 41.01, at 246 ("Statutes which retroactively impose or increase the severity of criminal laws as to pre-enactment offenses are called ex post facto laws and generally are prohibited by specific constitutional provisions."). The clause only prohibits retroactive criminal laws. *See* Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798). *See also* Slawson, *Constitutional and Legislative Considerations in Retroactive Lawmaking*, 48 CAL. L. REV. 216, 222 (1960):

> [L]imitation of the criminal sanction seems to rest, ultimately, on a belief in free will. A man is a criminal only if he chooses to do that which society calls criminal. Seen from this perspective the absolute ban on ex-post facto criminal laws is explicable as a ban on condemning a man when the element of choice which society has chosen as its basis of condemnation . . . could not have been present. . . . On this rationale, the wisdom of *Calder v. Bull* is evident. Choice is seldom an essential condition for the civil imposition of duties or deprivations of rights and liberties, because no one is being morally condemned for having chosen wrongly.

The ex post facto clause generally does not apply to regulatory interpretations. It applies, by its terms, only to legislative, not judicial, lawmaking. *See* Marks v. United States, 430 U.S. 188, 191 (1977); Bouie v. City of Columbia, 378 U.S. 347, 352-55 (1964). *See also* Weaver v. Graham, 450 U.S. 24, 28 (1981). The due process clause does, however, apply to judicial actions. *See* Marks v. United States, *supra*; Bouie v. City of Columbia, *supra*.

Regulatory interpretations should, like judicial interpretations, be exempt from the ex post facto clause. In many instances, an agency's adjudicatory arm will render interpretations, making them judicial in character. Although courts frequently defer to administrative interpretations, they are not required to do so. Thus, an interpretation does not have the force and effect of law until a court sustains it. At that point the rule applicable to judicial interpretations applies—the interpretation is not subject to the ex post facto clause. *See* note 16 *infra* and accompanying text.

Several lower courts have, however, held that the ex post facto clause applies to administrative interpretations. *See, e.g.*, Lerner v. Gill, 580 F. Supp. 1056, 1063 (D.R.I. 1984); Piper v. Perrin, 560 F. Supp. 253, 258 (D.N.H. 1983); Love v. Fitzharris, 311 F. Supp. 702, 703 (N.D. Cal. 1970). *See also* Holguin v. Raines, 695 F.2d 372 (9th Cir. 1982); United States v. Martino, 648 F.2d 367, 381 (5th Cir. 1981). These courts incorrectly assumed that

at least one of the canons of statutory construction.[5] The prohibition against retroactivity is not, however, absolute. Courts frequently sustain retroactive laws.[6] The Supreme Court of the United States has held that Congress may apply a new statute retroactively, provided its decision to do so is supported by a "legitimate legislative purpose" which is "furthered by rational means."[7] Additionally, one canon of statutory construction encourages retroactivity by requiring that "an appellate court . . . apply the law in effect at the time it renders its decision."[8] If a new law has taken effect, the court must apply it retroactively.

---

the ex post facto clause applies to judicial interpretations. They also assumed that administrative interpretations have the force and effect of law. Based on these misassumptions, the courts concluded that it was appropriate to apply the clause to administrative interpretations.

Although the ex post facto clause deals with criminal laws, one of its key components, the requirement of notice, does extend to civil laws and therefore to regulatory interpretations. This notice requirement is reflected in the prohibition against laws that are unduly vague or ambiguous. *See* Smith v. Goguen, 415 U.S. 566, 572-73 (1974) (vagueness analysis incorporates notions of fair notice or warning); Grayned v. City of Rockford, 408 U.S. 104, 108 (1972) ("[W]e insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning."); Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972) ("[All persons] are entitled to be informed as to what the State commands or forbids" which requires "fair notice of the offending conduct.") (quoting Lonzella v. New Jersey, 306 U.S. 451, 453 (1979)).

5 *See* United States v. Security Indus. Bank, 459 U.S. 70, 79 (1982) (statutes operate only prospectively); Union Pac. R.R. Co. v. Laramie Stock Yards Co., 231 U.S. 190, 199 (1913) ("The first rule of construction is that legislation must be considered as addressed to the future, not the past."); United States v. American Ref. Sugar Co., 202 U.S. 563, 577 (1906) (quoting United States v. Burr, 159 U.S. 78, 82-83 (1894)):

> [W]e are to remember there is a presumption against retrospective operation, and we have said that words in a statute ought not to have such operation "unless they are so clear, strong, and imperative, that no other meaning can be annexed to them, or unless the intention of the legislator cannot be otherwise satisfied."

6 *See* C. SANDS, *supra* note 2, § 41.03, at 249.

7 *See* Pension Benefit Guar. Corp. v. R.A. Gray & Co., 104 S. Ct. 2709, 2718 (1984) ("Provided that the retroactive application of a statute is supported by a legitimate legislative purpose furthered by rational means, judgments about the wisdom of such legislation remain within the exclusive province of the legislative and executive branches."). *See also* Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 16 (1976) ("[O]ur cases are clear that legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations.").

8 *See* Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 486 n.16 (1981) (quoting Thorpe v. Housing Auth. of Durham, 393 U.S. 268, 281 (1969)). *See also* Bradley v. School Bd. of Richmond, 416 U.S. 696, 711 (1974) ("We anchor our holding in this case on the principle that a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary."); United States v. Schooner Peggy, 5 U.S. (1 Cranch) 103, 109 (1801):

> [I]f, subsequent to the judgment, and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied. . . . [I]n great national concerns . . . the court must decide according to existing laws, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed but in violation of law, the judgment must be set aside.

Retroactivity problems also arise with interpretations of administrative regulations,[9] especially with initial interpretations. Substantial time can elapse between an agency's issuance of a regulation and its initial interpretation. If the regulation is vague or ambiguous, it can be difficult to ascertain what the regulation requires. A party can seek guidance from the responsible agency,[10] but that guidance may or may not be forthcoming.[11] If the agency does not provide any guidance, the regulated party is forced to guess how the agency will interpret the regulation. But guessing correctly is difficult. The interpretive process is beset by contradictory rules that make accurate prediction difficult.[12] In addition, the process can be influenced by extraneous considerations.[13] None-

---

See generally Corr, *Retroactivity: A Study in Supreme Court Doctrine "As Applied,"* 61 N.C.L. REV. 745, 756-57 (1983).

9 *See, e.g.*, Pennzoil Co. v. Department of Energy, 680 F.2d 156, 175 (Temp. Emer. Ct. App. 1982), *cert. dismissed*, 459 U.S. 1190 (1983); Runnells v. Andrus, 484 F. Supp. 1234, 1237-39 (D. Utah 1980); Phillips Petroleum Co. v. Department of Energy, 449 F. Supp. 760, 797 (D. Del.), *aff'd sub nom.* Standard Oil Co. v. Department of Energy, 596 F.2d 1029 (Temp. Emer. Ct. App. 1978).

10 Most agencies issue interpretive rulings on request. The IRS, for example, has special procedures and guidelines. *See* 26 C.F.R. § 601.201 (1985).

11 *See, e.g.*, Precious Metals Assocs., Inc. v. Commodity Futures Trading Comm'n, 620 F.2d 900, 909 (1st Cir. 1980).

12 The federal courts have not applied a uniform interpretive theory to regulations. *See* Weaver, *Judicial Interpretations of Administrative Regulations: An Overview*, 53 U. CIN. L. REV. 681, 683-85 (1984) [hereinafter cited as *An Overview*]. Instead, the courts use a diverse set of interpretive rules. *See* Weaver, *Judicial Interpretation of Administrative Regulations: The Deference Rule*, 45 U. PITT. L. REV. 587, 599-600 (1984) [hereinafter cited as *The Deference Rule*]. For example, courts frequently state that an agency's interpretation of its own regulations is entitled to deference. *See, e.g.*, United States v. Larionoff, 431 U.S. 864, 872 (1977); INS v. Stanisic, 395 U.S. 62, 72, *reh'g denied*, 395 U.S. 987 (1969); Thorpe v. Housing Auth. of Durham, 393 U.S. 268, 276 (1969). However, the courts apply the deference rule inconsistently, and will override it in favor of other seemingly inconsistent rules. *See, e.g.*, M. Kraus & Bros. v. United States, 327 U.S. 614, 620-21 (1946) (regulations that carry criminal sanctions should be strictly construed); United States v. Beam, 686 F.2d 252, 258 (5th Cir. 1982). Yet, the courts have no guidelines that indicate when these various rules should be applied. *See The Deference Rule*, *supra*, at 597-600. Thus, courts will occasionally override a given rule in favor of the deference rule, *see* Ehlert v. United States, 402 U.S. 99, 105 (1971) (deference rule applied to uphold a criminal conviction), or in favor of some other interpretive rule, *see, e.g.*, Jay v. Boyd, 351 U.S. 345, 360 (1956) (regulations should be construed to give effect to all their provisions); Pennzoil Co. v. FERC, 645 F.2d 360, 383 (5th Cir. 1981) (regulations should be construed liberally to effectuate their purpose), *cert. denied*, 454 U.S. 1142 (1982); Northern Natural Gas Co. v. O'Malley, 277 F.2d 128, 134 (8th Cir. 1960) (a regulation should be interpreted in a manner calculated to avoid constitutional infirmities); Weissglass Gold Seal Dairy Corp. v. Butz, 369 F. Supp. 632, 636 (S.D.N.Y. 1973) (as between two or more possible interpretations of a regulation, the reasonable one should be chosen).

13 Two major factors often influence the manner in which a regulation is interpreted. The first is a change in presidential administrations. Frequently, the regulatory philosophy of a later administration differs from that of a prior administration, *see The Deference Rule*, *supra* note 12, at 612-14, and can influence an agency's interpretation and thereby produce different results under different administrations. *Id.* at 613 n.147. The second factor is that as an agency gains more expertise with a regulatory scheme, its interpretation of that

theless, the regulated party must guess correctly or it may be subjected to an alternate interpretation.[14]

Retroactivity problems can also arise with previously interpreted regulations. Agencies change their initial interpretations,[15] courts sometimes overrule them,[16] and both apply new interpreta-

---

scheme can change. *Id.* at 612. The same phenomenon occurs when agencies interpret statutes. *See* tenBroek, *Interpretive Administrative Action and the Lawmaker's Will*, 20 OR. L. REV. 206, 208-09 (1941). *See also* Griswold, *A Summary of the Regulations Problem*, 54 HARV. L. REV. 398, 405 (1941).

14 Some courts, however, will overturn alternate interpretations. *See* Louisiana v. Department of Energy, 507 F. Supp. 1365, 1376 (W.D. La. 1981), *aff'd*, 690 F.2d 180 (Temp. Emer. Ct. App. 1982), *cert. denied*, 460 U.S. 1069 (1983):

> The cases are clear that a post hoc agency interpretation of an ambiguous regulation should not be enforced retroactively against a regulated party who adopted and applied an alternate reasonable interpretation of the regulation during the period between the initial promulgation of the ambiguous regulation and the later agency interpretation . . . .

See also Standard Oil Co. v. Federal Energy Admin., 453 F. Supp. 203, 238 (N.D. Ohio), *aff'd sub nom.* Standard Oil Co. v. Department of Energy, 596 F.2d 1029 (Temp. Emer. Ct. App. 1978) (administrative interpretation of regulation, which was applied retroactively following the first explicit statement of the interpretation, was held invalid). In Saint Francis Memorial Hosp. v. Weinberger, 413 F. Supp. 323, 332-35 (N.D. Cal. 1976), the meaning of Medicare reimbursement regulations was unclear. The Medicare Provider Appeals Committee noted that "although it is repugnant to its sense of equity and fairness to apply any new rule retroactively, Manual Section 206 of HIM-15 is interpretive only for purposes of clarifying the Regulations and must be applied to all periods under the Medicare Program." *Id.* at 334 n.4. The reviewing court disagreed, and noted that "because section 206 conditions the reimbursement of interest expenses during construction on compliance with the capitalization requirement where no such condition existed before, the court holds that section 206 may not be applied retroactively." *Id.* at 334. The problem of alternate interpretations also arises when courts interpret statutes. *See* Moody, *Retroactive Application of Law-Changing Decisions in Michigan*, 28 WAYNE L. REV. 439, 461 (1982):

> [M]any first impression cases implicate long standing customs and courses of conduct, and the reliance upon these practices may well be as justified as the reliance upon an earlier judicial statement. . . . [A]s with a sudden overruling decision rendered without prior warning, the pure novelty of a first impression ruling may create a need to cushion its impact upon the parties through the prospectivity technique.

But see Mishkin, *Foreword: The High Court, The Great Writ, and the Due Process of Time and Law*, 79 HARV. L. REV. 56, 60 (1956):

> Even when "new law" must be made, it is often in fact a matter of the court articulating particular clear implications of values so generally shared in the society that the process might well be characterized as declaring a preexisting law. Moreover, this must inevitably be so. For it is the basic role of courts to decide disputes after they have arisen. That function requires that judicial decisions operate (at least ordinarily) with retroactive effect. In turn, unless those decisions (at least ordinarily) reflect preexisting rules or values, such retroactivity would be intolerable.

15 *See, e.g.*, McDonald v. Watt, 653 F.2d 1035, 1044-45 (5th Cir. 1981); Runnells v. Andrus, 484 F. Supp. 1234, 1237 (D. Utah 1980). *See also* Algoma Plywood & Veneer Co. v. Wisconsin Employment Rltns. Bd., 336 U.S. 301, 327 (1949) (Black, J., dissenting) ("I would not make a trap of this settled administrative interpretation by subjecting this employer to penal damages for his good faith reliance on it."); NLRB v. Majestic Weaving Co., 355 F.2d 854, 860 (2d Cir. 1966).

16 The Supreme Court's landmark decision in Marbury v. Madison, 5 U.S. (1 Cranch) 368, 388-89 (1803), established that it is peculiarly the "province and duty of the courts to

tions retroactively. Nevertheless, the regulated person may be forced to rely on existing administrative interpretations even though they might be overruled. Although courts have the authority to independently determine a regulation's meaning,[17] they often defer to administrative interpretations. The Supreme Court has stated that such interpretations should be accepted provided they are not "plainly erroneous or inconsistent with the regulation."[18] Courts frequently reprimand those who fail to comply with administrative interpretations.[19] This creates the potential for unfairness: although courts generally expect compliance with administrative interpretations, they sometimes penalize compliance if the interpretations are later overruled or revoked.[20]

This article examines how the federal courts respond to the retroactive effect of interpretations of administrative regulations. It also suggests a framework for responding to such effect in the future.

I. Current Federal Court Approaches to the Retroactivity of Regulatory Interpretations

A. *The Declaratory Theory*

Federal court approaches to retroactive interpretations of regulations vary. One approach, the declaratory theory,[21] postulates

---

say what the law is." *See also* Zuber v. Allen, 396 U.S. 168, 193 (1969); Trust of Bingham v. Commissioner, 325 U.S. 365, 671-72 (1945); First Nat'l Bank in Sioux Falls v. National Bank of S.D., 667 F.2d 708, 711 (8th Cir. 1981).

17 The Administrative Procedure Act's judicial review provisions require a reviewing court to "decide all relevant questions of law." 5 U.S.C. § 706 (1982). Despite this provision, the federal courts frequently defer to administrative interpretations. *See, e.g.*, Ford Motor Credit Co. v. Milhollin, 444 U.S. 555 (1980); Northern Ind. Pub. Serv. Co. v. Walton League of Am., Inc., 423 U.S. 12 (1975). The courts do so in an undisciplined manner, making it difficult to predict when deference will be given, or what the level of deference will be. *See The Deference Rule*, *supra* note 12, at 590-600.

18 United States v. Larionoff, 431 U.S. 864, 872 (1972) (quoting Bowles v. Seminole Rock Co., 325 U.S. 410, 414 (1945)). *See also* INS v. Stanisic, 395 U.S. 62, 72 (1969); Thorpe v. Housing Auth. of Durham, 393 U.S. 268, 276 (1969).

19 *See, e.g.*, EEOC v. Puget Sound Log Scaling and Grading Bureau, 752 F.2d 1389, 1391 (9th Cir. 1985):

> In 1979, the EEOC issued guidelines in question and answer form warning employers that EEOC considered the [Act to apply in the manner in which it was ultimately applied] . . . . Puget Sound could predict that those guidelines of the enforcing agency would be given deference by the courts . . . . These earlier EEOC policies should have served as a warning to Puget Sound and other employers . . . .

20 For a discussion of cases presenting this problem, see United States v. Exxon Corp., 87 F.R.D. 624, 630-36 (D.D.C. 1980). *See also* Dixon v. United States, 381 U.S. 68 (1965); Manocchio v. Commissioner, 710 F.2d 1400, 1403 (9th Cir. 1983); Charbonnet v. United States, 320 F. Supp. 874, 878 (E.D. La. 1971).

21 Blackstone advocated the declaratory theory in the context of judicial interpretation of precedent rather than interpretation of regulations. In particular, he focused on the situation in which a judge overrules prior precedent and then must decide whether to apply

that regulatory interpretations do not have retroactive effect because interpretations do not create law, but merely declare existing law.[22] Thus, interpretations cannot be retroactive since they do not apply "new law" to prior events.[23]

Even though some courts continue to adhere to it, the declaratory theory has been widely repudiated.[24] Most modern courts and commentators recognize that interpretations do more than "declare existing law;" they can, in fact, create law.[25] Interpretive

---

the new decision to prior events. Blackstone concluded that the new decision should be applied because when judges alter legal rules they "do not pretend to make a new law, but to vindicate an old one from misrepresentation. For if it be found that the former decision is manifestly absurd or unjust, it is declared, not that such a sentence was *bad law*, but that it was *not law*." 1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 70 (T. Cooley 4th ed. 1884). *See also* M. HALE, HISTORY OF THE COMMON LAW 64 (4th ed. 1713); Traynor, *Quo Vadis, Prospective Overruling: A Question of Judicial Responsibility*, 28 HASTINGS L.J. 533, 534-35 (1977).

22 *See, e.g.*, Energy Reserves Group, Inc. v. Department of Energy, 589 F.2d 1082, 1098 (Temp. Emer. Ct. App. 1978), *cert. denied*, 105 S. Ct. 576 (1984) ("If Ruling 1974-29 was a reasonable interpretation . . . , it had no impact. In that event the impact came from the statute and valid legislative regulation being interpreted, not from the interpretative ruling."); Gosman v. United States, 573 F.2d 31 (Ct. Cl. 1978) ("All agree that an interpretative rule merely clarifies or explains existing laws or regulations."); Charbonnet v. United States, 455 F.2d 1195, 1199 (5th Cir. 1972) ("Regulations do not create law; they merely explain existing legislation. Theoretically, then, we are not called upon to make the law retroactive, only the administrative agency's interpretation of it.").

23 *See, e.g.*, Petrolite Corp. v. FERC, 667 F.2d 664, 668 (8th Cir. 1981):

> The parties are agreed that if the order exempting hardboard is legislative, then it is proper for it to be prospective, whereas if the order is interpretative, then it should be given retroactive effect. The rationale for this distinction is that a commission or agency creates a new law when it issues legislative rules, while it merely applies existing law when it issues interpretative rules.

See Allen v. Bergland, 661 F.2d 1001, 1007 (4th Cir. 1981) ("An interpretative rule effectuates no change in policy or law and merely explains or clarifies existing law or regulations."). *See also* Energy Consumers and Prod. Ass'n, Inc. v. Department of Energy, 632 F.2d 129, 141-42 (Temp. Emer. Ct. App.), *cert. denied*, 449 U.S. 832 (1980); Woods v. Benson Hotel Corp., 81 F. Supp. 46, 51-52 (D. Minn. 1948).

24 *See* Corr, *supra* note 8, at 746; Moody, *supra* note 14, at 441; Munzer, *supra* note 3, at 374-75; Comment, *Prospective Application of Judicial Decisions*, 33 ALA. L. REV. 463, 466 (1982) [hereinafter cited as *Prospective Application*]; *Prospective Overruling*, *supra* note 2, at 907-09; Note, *Judicial Review of Reversals of Policy by Administrative Agencies*, 68 HARV. L. REV. 1251, 1255-56 (1955). But there were historical reasons for its development. *See* Snyder, *Retrospective Operation of Overruling Decisions*, 35 ILL. L. REV. 121 (1940).

25 *See* Shapiro v. United States, 335 U.S. 1, 42-43 (1948) (Frankfurter, J., dissenting) ("Construction, no doubt, is not a mechanical process and even when most scrupulously pursued by judges may not wholly escape some retrospective infusion so that the line between interpretation and substitution is sometimes thin."); 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 7.23, at 112 (2d ed. 1979):

> *If* interpretative rules were always merely interpretations of law that already exists, they could never be retroactive, for if they fail to reflect the true meaning of the law they interpret, they would be invalid for that reason, and if they reflect that meaning they do not make law retroactively. The obvious reality is, of course, that what is done in the name of interpretation often adds to the meaning that is already in what is interpreted . . . .

See also R. DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 27 (1975);

problems can arise that the promulgating agency did not anticipate.[26] Thus, a court has no law to find and declare, at least in the sense that the promulgating agency considered the interpretive problem and prescribed a solution.[27] Moreover, since the problem was unanticipated, a reviewing court that carefully examines a regulation's history may find only the most general guidance, or none at all.[28]

If available interpretive materials do not provide an answer to an interpretive problem, the reviewing court must provide the answer itself.[29] In doing so, the court creates law[30] by qualifying, restricting, or adding to vague or ambiguous regulatory language.[31] The degree to which the court may be creative depends on the interpretive problem. The regulation's language and available interpretive materials may severely restrict the range of interpretive options. If these do not, the interpreting court may be free to choose from several different interpretations which produce very different results.[32]

Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417 (1898-99); Nathanson, *Administrative Discretion in the Interpretation of Statutes*, 3 VAND. L. REV. 470, 491-92 (1950); Slawson, *supra* note 4, at 245. *But see* Thomas, *Statutory Construction When Legislation is Viewed as a Legal Institution*, 3 HARV. J. ON LEGIS. 191, 191-95 (1966).

26 *See An Overview*, *supra* note 12, at 692-94.

27 *Id.*

28 *Id.* at 694-99.

29 *Id.* at 689-90, 699-701.

30 *See* Corr, *Administrative Law and the Interpretation of Statutes*, 1 U. TORONTO L.J. 286, 291 (1935) ("In many cases, there is no logical compulsion on the judge to accept a single meaning; two or more possible meanings are open to him. In making his choice he makes law in spite of his protestations to the contrary.").

31 *See* Morgenthau, *Implied Regulatory Powers in Administrative Law*, 28 IOWA L. REV. 575, 585 (1943):

> What administrative agencies and courts do when they interpret a statutory provision . . . is, therefore, not in essence, but only in the degree of discretion which the interpreting officer may exercise, different from what Congress is doing when it legislates under the Constitution. . . . They all legislate by substituting specific, individualized rules for general and abstract rules and by thus creating rules of law which would not exist had they not been created by them; they all interpret by remaining, while legislating, within the limits of abstract, general rules of law. He who interprets of necessity legislates, and he who legislates of necessity interprets.

See also M. COHEN & F. COHEN, READINGS IN JURISPRUDENCE AND LEGAL PHILOSOPHY 450-54 (1951).

32 Professor Dickerson provides a sound discussion of the subject in his analysis of statutory construction:

> [W]e may conclude that whenever a court can say with reasonable confidence, "This reading of the statute is one that the typical reader views as most probably intended by the legislature," it has ascertained the meaning of the statute in the general sense. Such a conclusion, being one of fact, is reached for the most part according to the cognitive aspects of communication principles not peculiar to the law. We may conclude also that, whenever a court can say only "We cannot be reasonably sure which, if any, of a wide range of compatible readings was probably the intended one," or "What we perceive to be the meaning of the statute does not adequately resolve the current controversy," the meaning that it thereupon as-

B. *Retroactivity*

Those courts which recognize that regulatory interpretations can have retroactive effect are forced to determine whether that effect is desirable or permissible.[33] They do so under a model formulated by the Supreme Court in *SEC v. Chenery Corp.*,[34] which requires a reviewing court to balance:

> [s]uch retroactivity . . . against the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles. If that mischief is greater than the ill effect of the retroactive application of a new standard, it is not the type of retroactivity which is condemned by law.[35]

Chenery itself did not involve an interpretation of a regulation. Rather, it involved the question of whether the Securities and Exchange Commission (SEC) could create legislative rules by adjudication, without using notice and comment procedures, and whether it could then apply those new rules retroactively.[36] The Public Utility Holding Company Act of 1935 mandated that utility reorganizations must be "fair and equitable to the persons affected thereby,"[37] that securities could not be issued on terms "detrimental to the public interest or the interests of investors,"[38] and that the reorganization may not result in the "unfair or inequitable distribution of voting power."[39] In *Chenery*, the SEC was forced to apply these general provisions to a previously unaddressed situation: a reorganization plan which distributed preferred stock to a com-

---

signs to the statute involves the kind of disciplined creativity that is more appropriately classed as "judicial lawmaking." The problem of choosing among a number of plausible alternatives, not calling for an act of discovery, is not one of fact, but of judicial responsibility discharged according to principles peculiar to the law.

R. DICKERSON, *supra* note 25, at 27.

33 *See, e.g.*, Stewart Capital Corp. v. Andrus, 701 F.2d 846, 848-49 (10th Cir. 1983); Montgomery Ward & Co. v. FTC, 691 F.2d 1322, 1328 (9th Cir. 1982); McDonald v. Watt, 653 F.2d 1035, 1042-46 (5th Cir. 1981).

34 332 U.S. 194 (1947).

35 *Id.* at 203.

36 The Court confronted the same problem again in NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974). Like *Chenery*, *Bell* involved the question of whether precedent and interpretation of a statute could be applied retroactively. Unlike *Chenery*, *Bell* involved a case of second impression. Prior administrative decisions suggested that Bell's interpretation was correct. But the National Labor Relations Board (NLRB) reversed its prior decisions, and sought to apply its new decision to Bell. The Supreme Court affirmed the NLRB's right to alter its prior precedent, as well as its right to apply the new precedent retroactively. The Court emphasized that the NLRB was not seeking to impose either a fine or damages on Bell. Moreover, the Court noted that the matter was not final because the case had to be remanded for a final determination about whether Bell had violated the new interpretation. *Id.* at 294-95. At the same time, the Court held that, under the facts, "the Board 'is not now free' to read a new and more restrictive meaning into the Act." *Id.* at 289.

37 *Chenery*, 332 U.S. at 204.

38 *Id.*

39 *Id.*

pany's officers and directors. The SEC invalidated the provision and in the process formulated a general prohibition against such distributions.[40]

The Supreme Court upheld the SEC's decision to create the rule adjudicatively and to apply the new rule retroactively. The Court suggested that although it is generally preferable for an agency to create rules in advance using its notice and comment procedures, an agency could create adjudicative rules.[41] To the extent that the latter rules had retroactive effect, they had to be subjected to the balancing test. Applying the test, the Court held that the regulatory interest in applying the interpretation retroactively outweighed the ill effect.[42] Lower federal courts have extended *Chenery* to interpretations of regulations.[43] This extension was appropriate because many interpretations are initially announced in the form of precedent.[44]

C. *Estoppel*

Some courts consider retroactivity issues under an estoppel analysis, determining whether an agency should be estopped from retroactively imposing a regulatory interpretation. This argument often surfaces when agencies revoke prior interpretations which parties have relied on and then substitute inconsistent ones.[45] Courts usually reject estoppel claims. The general rule is that the government cannot be estopped,[46] a rule that courts apply to inter-

40 *Id.*

41 *Id.* at 201-05.

42 *Id.* at 203.

43 *See, e.g.*, Pennzoil Co. v. Department of Energy, 680 F.2d 156, 175 (Temp. Emer. Ct. App. 1982), *cert. dismissed*, 459 U.S. 1190 (1983); Ruangswang v. INS, 591 F.2d 39 (9th Cir. 1978); Phillips Petroleum Co. v. Department of Energy, 449 F. Supp. 760, 797 (D. Del.), *aff'd sub nom.* Standard Oil Co. v. Department of Energy, 596 F.2d 1029 (Temp. Emer. Ct. App. 1978).

44 *See, e.g.*, McDonald v. Watt, 653 F.2d 1035, 1044-45 (5th Cir. 1981); Runnells v. Andrus, 484 F. Supp. 1234, 1237 (D. Utah. 1980).

45 *See, e.g.*, Garvey, Inc. v. United States, 726 F.2d 1569, 1571-72 (Fed. Cir.), *cert. denied*, 105 S. Ct. 99 (1984) (plaintiff argued that the Commissioner of the Internal Revenue Service should be estopped from applying a regulation literally because he published, during the relevant time period, a different interpretation; the court rejected the estoppel claim); United States v. Exxon Corp., 561 F. Supp. 816, 845-48 (D.D.C. 1983) (estoppel claim rejected because defendant's reliance was not reasonable, and because of judicial reluctance to estop the government); Tenneco Oil Co. v. Department of Energy, 475 F. Supp. 299, 312 (D. Del. 1979) (court declined to consider an argument that the Department of Energy should be precluded from applying an interpretation retroactively because the plaintiff failed to raise it in prior administrative proceedings). *See also* Manocchio v. Commissioner, 710 F.2d 1400, 1402-03 (9th Cir. 1983) (court rejected an allegation that the IRS should be estopped from denying a deduction when the taxpayer relied on a misleading revenue ruling and IRS publication construing the Internal Revenue Code).

46 *See* Heckler v. Community Health Serv. of Crawford County, Inc., 104 S. Ct. 2218, 2224 (1984); INS v. Hibi, 414 U.S. 5, 8 (1973) (per curiam); Federal Crop Ins. Corp. v.

pretations.[47] Only the lower courts have imposed an estoppel, and then only in unusual circumstances.[48]

D. *Vagueness*

Courts also decide retroactivity issues under a vagueness analysis. Instead of focusing on an interpretation's retroactive effect, courts focus on whether the underlying regulation is unduly vague or ambiguous.[49] Vagueness challenges allege that a regulation is

---

Merrill, 332 U.S. 380, 383 (1947); Woodstock/Kenosha Health Center v. Schweiker, 713 F.2d 285, 289, 291 (7th Cir. 1983). *See also* Schweiker v. Hansen, 450 U.S. 785, 788 (1981) ("This Court has never decided what type of conduct by a Government employee will estop the Government from insisting upon compliance with valid regulations . . . ."); Montana v. Kennedy, 366 U.S. 308, 315 (1961) ("[W]e need not stop to inquire whether, as some lower courts have held, there may be circumstances in which the United States is estopped to deny citizenship because of conduct of its officials."). Some lower courts do, however, allow the government to be estopped. *See* Portmann v. United States, 674 F.2d 1155, 1161-62 (7th Cir. 1982); United States v. Lazy FC Ranch, 481 F.2d 985, 988-90 (9th Cir. 1973).

47 *See* Heckler v. Community Health Serv. of Crawford County, Inc. 104 S. Ct. 2218, 2227 (1984) (agency's fiscal intermediary gave erroneous advice about the proper meaning and application of regulatory provisions; the Supreme Court held that the agency was not estopped); Emery Mining Corp. v. Secretary of Labor, 744 F.2d 1411, 1416 (10th Cir. 1984) ("Emery's estoppel argument also must fail. . . . To the extent Emery relied on an interpretation by MSHA officials of the Act's implementing regulations, Emery assumed the risk that interpretation was in error."); Pennzoil Co. v. Department of Energy, 680 F.2d 156, 176 (Temp. Emer. Ct. App. 1982) ("There is simply no basis in the circumstances of the present case to find unreasonableness, unfairness, or any element of estoppel in applying the agency interpretation to the relevant period in question here . . . ."), *cert. dismissed*, 459 U.S. 1190 (1983); United States v. Exxon Corp., 561 F. Supp. 816, 845-48 (D.D.C. 1983).

Most cases, however, involve interpretations of statutes rather than regulations. *See* Automobile Club of Michigan v. Commissioner, 353 U.S. 180, 184 (1957) (court notes that the Commissioner cannot be estopped from revoking an interpretation retroactively); Manocchio v. Commissioner, 710 F.2d 1400, 1402-03 (9th Cir. 1983) (estoppel claim rejected on several grounds: IRS presumes that revenue rulings will be retroactive; estoppel should be applied against the government only with the utmost caution and restraint; Congress, not the Commissioner, makes the tax laws, and any mistakes made by the Commissioner must therefore be corrected; and injury to this taxpayer was not so severe as to be "profound and unconscionable"); Pollack v. Commissioner, 392 F.2d 409, 411 (5th Cir. 1968) ("The Commissioner may indeed retroactively correct any prior erroneous interpretation of the law, even though a taxpayer may have relied to his detriment on the Commissioner's mistake . . . .").

48 *See* Schuster v. Commissioner, 312 F.2d 311, 318 (9th Cir. 1962) ("It is our conclusion that the Bank's equitable interest is so compelling, and the loss which it would sustain so unwarrantable, as to justify the application of the estoppel doctrine against the Commissioner."); Elkins v. Commissioner, 81 T.C. 669, 679-81 (1983) (Commissioner of Internal Revenue cannot apply an interpretation retroactively when "there is evidence of unconscionable injury or undue hardship suffered by the taxpayer through reliance on the erroneous position") (quoting with approval from Manocchio v. Commissioner, 78 T.C. 989, 1001 (1982), *aff'd*, 710 F.2d 1400 (9th Cir. 1983)). *See generally* Note, *The Due Process Implications of Estoppel Claims in Deportation Proceedings*, 60 TEX. L. REV. 61 (1981).

49 *See* Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 497-98 (1982); Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972); Diebold, Inc. v. Marshall, 585 F.2d 1327, 1335-36 (6th Cir. 1978). *See generally* Amsterdam, *The Void-for-Vagueness Doctrine in the Supreme Court: A Means To An End*, 109 U. PA. L. REV. 67 (1960); Collings,

inadequate in one of two ways: that it fails to give those subject to it fair notice of what is required, and therefore deprives them of an opportunity to comply with those requirements;[50] or that it fails to give meaningful standards to those who enforce the regulation, leaving them to enforce it in an arbitrary or discriminatory manner.[51]

Under the vagueness approach, judicial review has generally been limited.[52] Most regulations implicate only economic activity, and courts will tolerate more indefiniteness in economic regulations than in regulations affecting fundamental rights.[53] There are

Unconstitutional Uncertainty—An Appraisal, 40 CORNELL L.Q. 195 (1955). When economic regulations are involved, courts apply a somewhat lower standard. *See* text accompanying notes 53-60 *infra*.

50 *See* Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 497-98 (1982); Grayned v. City of Rockford, 408 U.S. 104, 108 (1972) ("Vague laws may trap the innocent by not providing fair warning."). *See also* Force, *Decriminalization of Breach of the Peace Statutes: A Nonpenal Approach to Order Maintenance*, 46 TUL. L. REV. 367, 431 (1972); Kuhn, *Jury Discrimination: The Next Phase*, 41 S. CAL. L. REV. 235, 276 (1968); Ratner, *The Function of the Due Process Clause*, 116 U. PA. L. REV. 1048, 1085 (1968); Robinson, *The FCC and the First Amendment: Observations on 40 Years of Radio and Television Regulation*, 52 MINN. L. REV. 67, 146-47 (1967).

51 *See* Papachristou v. City of Jacksonville, 405 U.S. 156, 171 (1972); Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972) ("A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application."); Smith v. Goguen, 415 U.S. 566, 575 (1974) (Vagueness requires legislatures to set reasonably clear guidelines for law enforcement officials to prevent them from pursuing their personal predilections. "Legislatures may not so abdicate their responsibilities for setting the standards of the criminal law."). *See also* Cass, *Ignorance of the Law: A Maxim Reexamined*, 17 WM. & MARY L. REV. 671, 674 (1976); Givelber, *The Application of Equal Protection Principles to Selective Enforcement of the Criminal Law*, 1973 U. ILL. L.F. 88, 98 (1973); Jeffries, *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 197, 201 (1985); Klein, *Film Censorship: The American and British Experience*, 12 VILL. L. REV. 419, 428 (1967).

52 Initially, there was some doubt about whether the vagueness doctrine applied to enactments with only economic implications. *See* Edgar A. Levy Leasing Co. v. Siegel, 258 U.S. 242 (1922). Subsequent decisions suggest that the doctrine does apply to such enactments. *See* Boutilier v. INS, 387 U.S. 118, 123 (1967); A. B. Small Co. v. American Sugar Ref. Co., 267 U.S. 233, 239 (1925). The Court rejected the suggestion in *Levy Leasing* that the void for vagueness doctrine is inapplicable in civil cases:

> The ground or principle of the decisions was not such as to be applicable only to criminal prosecutions. It was not the criminal penalty that was held invalid, but the exaction of obedience to a rule or standard which was so vague and indefinite as really to be no rule or standard at all.

267 U.S. at 239. *See also* Amsterdam, *supra* note 49, at 69-70 n.16; Collings, *supra* note 49, at 208.

53 *See* Smith v. Goguen, 415 U.S. 566, 573 n.10 (1974) (in dicta the court referred to "the less stringent requirements of the modern vagueness cases dealing with purely economic regulation"); United States v. Batson, 706 F.2d 657, 679 (5th Cir. 1983); Exxon Corp. v. Busbee, 644 F.2d 1030, 1033 (5th Cir.) (In dealing with a problem of statutory interpretation the court stated that: "[b]ecause the statute is not concerned with either the first amendment or the definition of criminal conduct, however, we must be lenient in evaluating its constitutionality."), *cert. denied*, 454 U.S. 932 (1981); Brennan v. OSHRC, 505 F.2d 869, 872 (10th Cir. 1974); United Nuclear Corp. v. Cannon, 553 F. Supp. 1220, 1233 (D.R.I. 1982).

several justifications for this decreased level of scrutiny: many regulatory schemes implicate limited subject areas, and those subject to regulation can be expected to take affirmative steps to resolve ambiguity or uncertainty;[54] those subject to a regulation can resolve uncertainty by seeking interpretive guidance from the responsible agency;[55] economic interests are generally entitled to less protection than more fundamental rights;[56] and the penalties attached to violations of economic regulations are deemed to be qualitatively less severe.[57] Moreover, courts tend to evaluate economic regulations under an "as applied" standard.[58] Even though a regulation may be vague on its face, it can withstand a vagueness challenge if it is not vague as applied to the defendant.[59] Thus, retroactive interpretations are routinely upheld.[60]

Under vagueness doctrine, courts are more willing to invali-

54 *See* Heckler v. Community Health Serv. of Crawford County, Inc., 104 S. Ct. 2218, 2222 (1984).

55 *See* Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 498 (1982); United Nuclear Corp. v. Cannon, 553 F. Supp. 1220, 1235 (D.R.I. 1982).

56 *See* text accompanying notes 61-64 *infra*.

57 *See* Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 498 (1982). The review standard for economic interests is somewhat vague. The Supreme Court has stated that economic provisions must be set out in terms ordinary people exercising common sense can understand. *See* Boyce Motor Lines, Inc. v. United States, 342 U.S. 337, 340 (1952); Ricci v. United States, 507 F.2d 1390, 1398 (Ct. Cl. 1974). *See also* Brennan v. OSHRC, 505 F.2d 869, 872 (10th Cir. 1974). Somewhat less scrutiny may, in fact, be applied. *See* text accompanying notes 119-125 *infra*. Moreover, when the regulation is directed at a limited audience possessing specialized knowledge or understanding, a court will evaluate the regulation in light of that specialized knowledge or understanding. *See* Fleming v. Department of Agriculture, 713 F.2d 179, 184 (6th Cir. 1983); Precious Metals Assocs., Inc. v. Commodity Futures Trading Comm'n, 620 F.2d 900, 907 (1st Cir. 1980).

58 *See, e.g.*, United States v. Batson, 706 F.2d 657, 678-80 (5th Cir. 1983); Magic Valley Potato Shippers, Inc. v. Secretary of Agriculture, 702 F.2d 840, 841 (9th Cir. 1983); Ray Evers Welding Co. v. OSHRC, 625 F.2d 726, 732 (6th Cir. 1980). *See also* United States v. National Dairy Prods. Corp., 372 U.S. 29, 36 (1963).

59 *See, e.g.*, Exxon Corp. v. Busbee, 644 F.2d 1030, 1034 (5th Cir.) ("Section 1104.1 is, while most assuredly *not* a 'model of clarity,' . . . at least amenable to some sensible construction. Thus, it does alert the parties to the character of the proscribed conduct, . . . and does amount to something more than 'no rule . . . at all.' "), *cert. denied*, 454 U.S. 932 (1981).

60 *See, e.g.*, Precious Metals Assocs., Inc. v. Commodity Futures Trading Comm'n, 620 F.2d 900, 906-08 (1st Cir. 1980) (upholding provision against allegations of vagueness); National Indus. Constructors, Inc. v. OSHRC, 583 F.2d 1048, 1054 (8th Cir. 1978) (upholding OSHA regulation against vagueness challenge).

The one major exception has involved challenges against OSHA's personal protective regulation. 29 C.F.R. § 1910.132(a) (1982). Although most courts reject vagueness challenges levied against this regulation, *see* Voegele Co. v. OSHRC, 625 F.2d 1075, 1076 (3d Cir. 1980); General Dynamics Corp. v. OSHRC, 599 F.2d 453, 464 (1st Cir. 1979); Jensen Constr. Co. of Okla., Inc. v. OSHRC, 597 F.2d 246, 248 (10th Cir. 1979), at least two cases have invalidated OSHA's attempt to apply the regulation: Cape and Vineyard Div. of New Bedford Gas v. OSHRC, 512 F.2d 1148 (1st Cir. 1975) (regulation did not give fair warning of what was required); B & B Insulation, Inc. v. OSHRC, 583 F.2d 1364 (5th Cir. 1978) (invalidated agency's interpretation because it did not conform to industry practice). The latter decision was probably incorrect. *See* text accompanying notes 165-69 *infra*.

date regulations which affect fundamental constitutional rights—interests that have traditionally been accorded greater protection.[61] Included are regulations which implicate the freedom of speech,[62] and regulations that are applied in a criminal[63] or quasi-criminal

61 Any enactment that impinges on a fundamental constitutional right, especially one affecting first amendment rights, will receive an increased level of scrutiny under the vagueness doctrine. *See* Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 498 (1982); Smith v. California, 361 U.S. 147, 150-51 (1959). *See also* Rogge, *State Power Over Sedition, Obscenity and Picketing*, 34 N.Y.U. L. REV. 817, 846 (1959); Amsterdam, *supra* note 49, at 75; Collings, *supra* note 49, at 214:

> There remain to be considered . . . cases . . . where the statute was so broad and sweeping as to prohibit conduct protected by the Constitution. This is an area where the Supreme Court, at least in the twenty years since the mid-thirties, has seemingly recognized its special competence. As might be expected it is an area where the uncertainty doctrine has considerable viability . . . .

62 Regulations impinging on first amendment rights are scrutinized more closely because they can have a "chilling" effect on those rights. *See* Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 498 (1982). *See also* Smith v. California, 361 U.S. 147, 150-51 (1959); Walters v. Peterson, 495 F.2d 91 (D.C. Cir. 1973); Force, *supra* note 50, at 431; Ratner, *supra* note 50, at 1085.

Moreover, such regulations are generally examined for facial invalidity, rather than vagueness as applied. *See* United States v. National Dairy Products Corp., 372 U.S. 29, 36 (1963). A court may use an "as applied" standard, however, if the regulation has only a peripheral effect on first amendment rights. In *Walters*, *supra*, the court refused to apply a regulation prohibiting "misconduct which violates common decency in employee relations" to sustain an employee dismissal. The employees had picketed an agency cafeteria to protest alleged racism by supervisors. As part of their demonstration, they carried signs which read "Pigs Off Census" near two supervisors who were eating lunch. In refusing to uphold the dismissal, the court noted that the regulation was vague. It then emphasized that the agency had tolerated similar conduct on prior occasions. The court held that this prior tolerance, coupled with the regulation's vagueness, rendered the agency's application in this instance unacceptable. 495 F.2d at 100-01.

Vagueness challenges arose frequently during the 1960s and 1970s with regard to student conduct regulations. *See* Carrington, *Civilizing University Discipline*, 69 MICH. L. REV. 393, 400-01 (1971); Marinelli, *Student Conduct Regulations*, 22 CLEV. ST. L. REV. 125 (1973); Van Alstyne, *Procedural Due Process and State University Students*, 10 UCLA L. REV. 368, 389 (1963).

63 A heightened standard of review is applied in the criminal context because the potential penalties are qualitatively more severe. *See* Flemming v. Department of Agriculture, 713 F.2d 179, 184 (6th Cir. 1983) ("This standard for definiteness is less stringently measured in the absence of either criminal penalties or potential interference with constitutionally protected rights."); United States v. Batson, 706 F.2d 657, 679 (5th Cir. 1983) ("The Court has also expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe.") (quoting Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 445 U.S. 489, 498 (1982)). *See also* Bouie v. City of Columbia, 378 U.S. 347 (1964); Winters v. New York, 333 U.S. 507, 515 (1948) (in dealing with a vague statute the Court noted that more certainty is required of criminal statutes).

No court has clearly articulated the precise standard of review. Some courts state that a regulation must contain "ascertainable standards of guilt," or standards "sufficiently definite to give notice of required or prohibited conduct." *See Winters*, 333 U.S. at 515. Other courts state that no more than a reasonable degree of certainty is required. *See* Ricci v. United States, 507 F.2d 1390, 1398 (Ct. Cl. 1974).

context.[64] In these contexts, courts are more sensitive to the fact that regulatory interpretations can be "law creating," and examine more carefully whether retroactive effect is permissible.[65]

E. *Indirect Challenges*

Retroactivity issues can also surface indirectly. Regulations are usually interpreted, at least initially, by agencies rather than courts. In indirect challenges, litigants seek to invalidate these administrative interpretations. If they succeed, the court will not apply the interpretation at all, much less retroactively.

Litigants have persuaded courts to invalidate administrative interpretations on several grounds. One ground is that the interpretation is incorrect because it conflicts with the language or intent of a regulation.[66] Although the courts have not developed a uniform approach to interpreting regulations, many courts apply the intent theory whereby regulations are construed to effectuate the intent of the promulgating agency as of the date of promulgation.[67] These

64 *See generally* Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489 (1982); Diebold, Inc. v. Marshall, 585 F.2d 1327, 1335-36 (6th Cir. 1978).

65 *See* Hamling v. United States, 418 U.S. 87, 116-17 (1974); Bouie v. City of Columbia, 378 U.S. 347, 354-55 (1964):

> When a similarly unforeseeable state-court construction of a criminal statute is applied retroactively to subject a person to criminal liability for past conduct, the effect is to deprive him of due process of law in the sense of fair warning that his contemplated conduct constitutes a crime. . . . "[I]f the result above stated were attained by an exercise of the State's legislative power, the transgression of the due process clause of the Fourteenth Amendment would be obvious," and "[t]he violation is none the less clear when that result is accomplished by the state judiciary in the course of construing an otherwise valid . . . state statute."

(quoting from Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U.S. 673, 679-80 (1930)); Pierce v. United States, 314 U.S. 306, 311 (1941) ("[A] judicial enlargement of a criminal act by interpretation is at war with a fundamental concept of the common law that crimes must be defined with appropriate definiteness.").

66 Agencies and courts can use a number of different theories in interpreting regulations. The "intent" theory provides that a regulation should be construed in accordance with the intent of the enacting body. The "meaning" theory states that the interpretive goal is to uncover the meaning of the regulation. The "purpose" theory holds that a regulation should be construed to effectuate its purpose or objective. In addition, there are two other interpretive theories. One states that a judge should interpret a regulation in a manner designed to effectuate his own "social emotions" and "ideal scheme of society." The other provides that a judge should interpret a regulation in a manner designed to avoid unjust results. For a discussion of these theories, see *An Overview*, *supra* note 12, at 684-708. There are a number of useful, high quality articles on the subject of statutory interpretation. *See, e.g.*, R. DICKERSON, *supra* note 25; Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527 (1947).

67 *See, e.g.*, Rucker v. Wabash R.R. Co., 418 F.2d 146, 149 (7th Cir. 1969); Harnischfeger Corp. v. EPA, 515 F. Supp. 1310, 1314 (E.D. Wis. 1981); Honeywell, Inc. v. United States, 661 F.2d 182, 186 (Ct. Cl. 1981). Some courts use the terms "intent" and "purpose" interchangeably. *See, e.g.*, United States v. Ray, 488 F.2d 15, 18 (10th Cir. 1973); *Rucker*, 418 F.2d at 150. Max Radin has written a stinging criticism of the intent and purpose theories. Radin, *Statutory Interpretations*, 43 HARV. L. REV. 863 (1930). Although that article contains many sound criticisms, it goes too far. Indeed, Radin retreated from his

courts evaluate a regulation's language to see whether it is susceptible to the interpretation given. If not, the court will invalidate the interpretation.[68] Even if the regulation is susceptible to the agency's interpretation, these courts will evaluate the interpretation to make certain that it conforms to the regulation's intent. In some cases, litigants have demonstrated that an agency intended a regulation to mean one thing at the date of promulgation, but then subsequently interpreted the regulation in an inconsistent manner. In these cases courts have invalidated the interpretation.[69]

A second ground on which litigants have overturned administrative interpretations is by convincing a reviewing court to disregard the agency's interpretation and render its own instead.[70] Courts have the right to independently interpret regulations.[71] When agencies seek to retroactively apply interpretations of ambig-

---

position in later years. *See* Radin, *A Short Way with Statutes*, 56 HARV. L. REV. 388 (1942) (arguing that courts construe statutes according to their purpose). Moreover, his theories received substantial criticism. A contemporaneous response was prepared by James Landis. Landis, *A Note on "Statutory Interpretation,"* 43 HARV. L. REV. 886 (1930). Radin was partially persuaded by Landis, and his 1942 article contains an admission to that effect. There are other criticisms of Radin's theories as well. *See* R. DICKERSON, *supra* note 25, at 78; *An Overview*, *supra* note 12, at 684-708.

68 *See, e.g.*, Usery v. Kennecott Copper Corp., 577 F.2d 1113, 1119 (10th Cir. 1977). In the *Usery* case, an OSHA Regulation required that employers "provide" ladders to employees working on scaffolds. The Secretary of Labor interpreted the regulation as requiring employers to provide employees with ladders, and to force employees to use them. The court rejected the interpretation, noting that a "regulation cannot be construed to mean what an agency intended but did not adequately express."

69 *See* Sauder v. Department of Energy, 648 F.2d 1341, 1346 (Temp. Emer. Ct. App. 1981). In *Sauder*, the court characterized its holding in Tenneco Oil Co. v. FEA, 613 F.2d 298 (Temp. Emer. Ct. App. 1979), in the following manner: "We refuse (sic) to defer to the agency's interpretation of its regulations, not because the agency's interpretation was merely 'reasonable' and 'not compelled,' but because the agency sought to impose an interpretation 'plainly inconsistent with the language of the regulation.' " *See also* Fairfax Nursing Center, Inc. v. Califano, 590 F.2d 1297, 1301 (4th Cir. 1979) ("The Secretary is not free to promulgate regulations and then change their meaning by 'clarifications' or 'interpretations' issued without formal notice and comment. To do so would frustrate the policies of fair notice and comment in the Administrative Procedure Act.") (These statements are dicta because the court concluded that the problem was not presented.).

70 Courts frequently defer to agency interpretations. *See* text accompanying notes 17-20 *supra*. Senator Dale Bumpers of Arkansas has stated that "the judicially created doctrine of deference to agency interpretations of law, which some courts have elevated to a virtual presumption of correctness, places the bureaucratic thumb on the scales of justice, weighting them against the citizen." S. REP. No. 24, 97th Cong., 1st Sess. 170 (1981).

A strong argument can be made, however, that courts apply the deference rule in a result-oriented manner, giving deference only when it suits them. *See The Deference Rule*, *supra* note 12, at 590-91. *See also* K. DAVIS, *supra* note 25, at § 7.13; Gellhorn & Robinson, *Perspectives on Administrative Law*, 75 COLUM. L. REV. 771, 780-81 (1975); Landis, *supra* note 67, at 890; Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1, 3 n.18 (1983); Woodward & Levin, *In Defense of Deference: Judicial Review of Agency Action*, 31 AD. L. REV. 329, 335 (1979); Note, *Judicial Review of Regulations and Rulings Under the Revenue Acts*, 52 HARV. L. REV. 1163, 1164 (1939).

71 *See* notes 16-17 *supra*.

uous regulations, courts will sometimes exercise that right.[72] Courts will also reject the agency's interpretation if the agency has taken inconsistent positions regarding the meaning of its regulations.[73]

Many litigants strengthen their indirect challenges through the discovery process.[74] They may seek to reveal the agency's original intent regarding the meaning of a regulation, or they may seek to demonstrate that the agency's current interpretation is inconsistent with a prior one[75] or has been inconsistently applied.[76] Of course,

---

72 *See* Pennzoil Co. v. Department of Energy, 680 F.2d 156, 173 (Temp. Emer. Ct. App. 1982), *cert. denied*, 459 U.S. 1190 (1983):

> *Standard Oil* is a frequently cited and highly significant decision in the context of its particular circumstances. Where, as on points at issue there, an agency by legislative rulemaking has established no regulatory lodestar and its institutional compass has pointed in opposite or shifting directions, the rule of deference will not sustain the retroactive application of an interpretation of which an affected interest had no fair notice.

This statement is dicta. The court concluded that the agency's "regulatory lodestar" did not point in differing directions in the case. *See also* Mountain Fuel Supply Co. v. Department of Energy, 656 F.2d 690, 695 (Temp. Emer. Ct. App. 1981).

73 *Pennzoil*, 680 F.2d at 173.

74 The impetus for this discovery was the holding in Standard Oil Co. v. Department of Energy, 596 F.2d 1029 (Temp. Emer. Ct. App. 1978). Litigants there obtained comparable discovery in the lower court and used it to overturn the agency's interpretation. For a discussion of the *Standard Oil* case and its impact, see Weaver, *Contemporaneous Construction Discovery: Its Use and Abuse*, 20 WAKE FOREST L. REV. 367, 375-80 (1984) [hereinafter cited as *Contemporaneous Construction Discovery*].

This discovery has been called "contemporaneous construction discovery," a label which is misleading. The label implies that discovery is sought solely for the purpose of determining whether an interpretation was contemporaneously issued and therefore is entitled to heightened deference under the contemporaneous construction principle. For a discussion of that principle, see Great N. Ry. v. United States, 315 U.S. 262, 275 (1942); Norwegian Nitrogen Prod. Co. v. United States, 288 U.S. 294, 315 (1933) (contemporaneous construction of a statute by men charged with setting its machinery into motion is entitled to deference). Discovery *is* sought for that purpose. But the label also includes discovery sought for the purpose of determining whether an interpretation has been consistently applied. *See* cases cited at note 77 *infra*. It also includes discovery sought for the purpose of determining whether an interpretation conforms to the "intent" of the regulation. *See* Gulf Oil Corp. v. Schlesinger, 465 F. Supp. 913, 916 (E.D. Pa. 1979) (discovery requested of "agency officials responsible for formulating and interpreting regulations"). *See also* McCulloch Gas Processing Corp. v. Department of Energy, 650 F.2d 1216, 1229 (Temp. Emer. Ct. App. 1981) (discovery of rulemaking officials allowed); Amoco Prod. Co. v. Department of Energy, 29 Fed. R. Serv. 2d (Callaghan) 402, 404-05 (D. Del. 1979) (the court extended discovery to pre-promulgation documents in an attempt to find out what "the law was").

75 *See* Hydrocarbon Trading & Transp. Co. v. Exxon Corp., 89 F.R.D. 650, 655 (S.D.N.Y. 1981) ("Exxon contends that DOE's recent, nonfinal pronouncements interpreting § 211.9(a)(1) to encompass unlike product exchanges are inconsistent with the alleged contemporaneous construction accorded § 211.9(a)(1). . . . According to Exxon, it is entitled to conduct discovery to establish that DOE's recent, *post hoc* interpretation of the regulation is not entitled to deference . . . ." Discovery was denied.); Tenneco Oil Co. v. Department of Energy, 475 F. Supp. 299, 318 (D. Del. 1979) (Tenneco allowed to discover contemporaneous construction as well as subsequent application by agency).

76 *See, e.g.*, United States v. Exxon Corp., 87 F.R.D. 624, 630-33 (D.D.C. 1980) (Exxon

discovery is sometimes unnecessary. For example, it is often easy for a litigant to demonstrate that some interpretations have not been consistently applied and therefore are not entitled to deference. By definition, this is true when an agency changes its interpretation; the latter interpretation is necessarily inconsistent with the former.[77] But discovery may reveal that what appears to be a first impression interpretation is, in fact, a second impression interpretation. Although an agency has not formally interpreted a regulation, its personnel may have applied the regulation internally. If these internal interpretations are inconsistent with the agency's current interpretation, some courts refuse to defer to the current interpretation.[78] Additionally, administrative personnel may have informally advised those subject to the regulations to apply them in a particular manner. In a few instances, courts have accepted this advice as evidence of inconsistency.[79]

Recent judicial decisions have curtailed the use of indirect challenges by restricting the availability of discovery.[80] Previously, only the Department of Energy was subject to such discovery,[81] and that discovery presented substantial problems for the judiciary. Attempts to obtain discovery led to disputes about the necessity of the discovery[82] and whether the responsive documents were privileged.[83] Because many litigants sought large numbers of docu-

---

allowed to discover low level, unofficial agency statements that applied relevant provisions to determine if the regulations the agency sought to enforce retroactively were consistent with agency statements at the time in question). *See also* Quincy Oil, Inc. v. Federal Energy Admin., 468 F. Supp. 383, 388 (D. Mass. 1979).

77 *See, e.g.*, Pennzoil Co. v. Department of Energy, 680 F.2d 156, 175 (Temp. Emer. Ct. App. 1982), *cert. dismissed*, 459 U.S. 1190 (1983). *See* note 72 *supra*; Sauder v. Department of Energy, 648 F.2d 1341, 1346 (Temp. Emer. Ct. App. 1981) (Referring to its decision in *Standard Oil*, the court noted that "in refusing to defer to the agency's last interpretation of its regulations, we emphasized . . . the extraordinarily confused and contradictory agency interpretations which had preceded it."); Diamond v. Sturr, 221 F.2d 264 (2d Cir. 1955) (The agency's initial interpretation was rendered in 1940, but was later revoked and replaced by an inconsistent interpretation. The court refused to accept the later interpretation, noting that the prior interpretation was of long standing and had not previously been altered.).

78 *See* Standard Oil Co. v. Department of Energy, 596 F.2d 1029, 1056 (Temp. Emer. Ct. App. 1978). *See also Contemporaneous Construction Discovery*, *supra* note 74.

79 *Standard Oil*, 596 F.2d at 1056.

80 *See Contemporaneous Construction Discovery*, *supra* note 74.

81 This type of discovery developed as a result of the holding in *Standard Oil*, 596 F.2d at 1056, and continued to afflict that Department for many years. *See, e.g.*, United States v. Exxon Corp., 87 F.R.D. at 630-33; Tenneco Oil Co. v. Department of Energy, 475 F. Supp. 299, 318 (D. Del. 1979); Gulf Oil Corp. v. Schlesinger, 465 F. Supp. 913, 916-17 (E.D. Pa. 1979). Despite the success achieved by litigants against the DOE, discovery was not extended to other agencies.

82 *See, e.g.*, Hydrocarbon Trading & Transp. Co. v. Exxon Corp., 89 F.R.D. 650, 655-56 (S.D.N.Y. 1981); *Tenneco Oil Co.*, 475 F. Supp. at 317-18; *Quincy Oil, Inc.*, 468 F. Supp. at 387-88; Petrolane, Inc. v. United States, 79 F.R.D. 115, 119 (C.D. Cal. 1978).

83 *See, e.g.*, Coastal Corp. v. Duncan, 86 F.R.D. 514, 520-22 (D. Del. 1980) (claim of

ments in their discovery requests, and privilege disputes frequently extended to a percentage of the documents sought, a large number of documents were involved.[84] Courts were thus forced to resolve these disputes, sometimes on a document-by-document basis, requiring substantial expenditure of limited judicial resources. This situation prompted the courts to impose limitations on the scope of discovery.[85]

Nevertheless, indirect challenges remain a viable option. Because an agency's announced interpretations may sometimes conflict, litigants can demonstrate, even without discovery, that an agency has taken inconsistent positions regarding the meaning of its regulations. Moreover, discovery, although restricted, is still available and can be used to garner additional support for overcoming an interpretation.

A final way to overturn regulatory interpretations is by manipulating the canons of construction. As noted above, the courts have not developed a uniform theory for interpreting regulations,[86] and

---

attorney-client and work product privileges rejected); United States v. Exxon Corp., 87 F.R.D. at 636-39 (no privilege asserted but court raised matter on its own motion to provide guidelines for the parties); *Tenneco Oil Co.*, 475 F. Supp. at 318-19; *Gulf Oil Corp.*, 465 F. Supp. at 916-17.

84 Twenty five hundred documents were involved in Exxon Corp. v. United States, No. 75-0836 W (N.D. Tex. June 9, 1980), *discussed in* Department of Energy v. Crocker, 629 F.2d 1341, 1345 (Temp. Emer. Ct. App. 1980). These cases produced cries of exasperation from the judiciary. During oral argument in one case, the judge remarked that "this type of litigation just cannot be controlled under present circumstances." *Crocker*, 629 F.2d at 1345 (quoting Petitioners' Response to Supplemental Brief at Appendix A, Tr. of Argument at 44, Coastal Corp. v. Duncan, 86 F.R.D. 514 (D. Del. 1980)). The Temporary Emergency Court of Appeals remarked that it was "aware of the burden imposed upon the district judges by the broad discovery, covering hundreds or even thousands of documents, undertaken by parties in litigation with [the] DOE, given the assertion of privileges, as here, with respect to such a relatively large proportion of the documents sought." *Crocker*, 629 F.2d at 1345.

85 Early cases extended discovery to the lowest levels of the DOE, thereby geometrically expanding the number of responsive documents since that agency, like others, is pyramidal in structure. *See, e.g.*, United States v. Exxon Corp., 87 F.R.D. 624, 634 (D.D.C. 1980) (DOE ordered to search files at the national and regional level and to search "case specific law enforcement files" at the branch level); *Tenneco Oil Co.*, 475 F. Supp. at 318 (concluding that "internal memoranda, directives and guidelines generated and disseminated at a variety of levels are proper items of discovery"). The scope of this discovery was heavily influenced by the Temporary Emergency Court of Appeals' (TECA) statement in an earlier case that lower-level files might be relevant on the question of deference. *Standard Oil*, 596 F.2d at 1056 (Federal Energy Administration contended that "only the . . . General Counsel, his staff, and other 'high level policy makers' had the authority to issue official interpretations of its regulations." The court noted that it was entitled to consider how the regulation had been applied in fact by those officials, as well as by lower-level officials.). In Pennzoil Co. v. Department of Energy, 680 F.2d 156, 171 (Temp. Emer. Ct. App. 1982), after a spate of requests for contemporaneous construction discovery, the TECA retreated. It held that "opinions are to be given little weight, as such, unless they are institutional in character."

86 *See* text accompanying notes 21-32 *supra*.

instead have applied a variety of rules.[87] In some cases courts reject administrative interpretations by ignoring the presumption of deference in favor of other interpretive principles.[88] Litigants can, therefore, increase their chances of having a reviewing court overturn a regulatory interpretation by carefully choosing the interpretive principles they argue to the court.

II. Problems With Current Approaches

A. *Inconsistencies*

Current judicial approaches to retroactivity leave much to be desired. As in other interpretive areas, the courts use diverse approaches which give them broad discretion.[89] If a court chooses to reject a retroactivity claim, it can find that interpretations do not create law, but merely declare existing law. It can then hold that the regulation has no retroactive effect.[90] If a court chooses to accept a retroactivity claim, it can do so under many different theories: vagueness, retroactivity, and perhaps estoppel. It can also reject the agency's interpretation and render its own.[91]

It is difficult to reconcile these various approaches because they start from disparate premises. For example, the declaratory theory seems to conflict with the retroactivity and vagueness theories on whether regulatory interpretations create law and whether they can have retroactive effect.[92] Estoppel and retroactivity theories also conflict. Estoppel theory starts with the premise that the government should not be estopped, which makes a reviewing court likely to permit retroactive effect. Retroactivity theory, on the other hand, makes no such assumption. Thus, a reviewing court may be more inclined to refuse retroactive effect under that

87 Professor Karl Llewellyn demonstrated, in an incisive article on statutory interpretation, that the canons of construction can be found in inconsistent pairs. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes are to be Construed*, 3 VAND. L. REV. 395, 401-06 (1949). For example, although courts sometimes state that a "statute cannot go beyond its text," they also state that to "effect its purpose a statute may be implemented beyond its text." *Id.* at 401. In addition, courts sometimes indicate that "punctuation will govern when a statute is open to two constructions," but thereafter will state that "punctuation marks will not control the plain and evident meaning of language." *Id.* at 405. *See also* Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 805 (1983); Radin, *supra* note 67, at 873; Thomas, *supra* note 25, at 208-10; Tunks, *Assigning Legislative Meaning: A New Bottle*, 37 IOWA L. REV. 372, 381 (1952); Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 206-07 (1983).

88 *See The Deference Rule*, *supra* note 12, at 597-600.

89 *See* Llewellyn, *supra* note 87, at 401-06; *The Deference Rule*, *supra* note 12, at 590-602.

90 *See* cases cited at notes 22-23 *supra*.

91 *See* text accompanying notes 66-73 *supra*.

92 *Compare* text accompanying notes 21-32 *supra with* text accompanying notes 33-44 *supra*.

theory.[93]

Similar conflicts can be found between vagueness analysis and retroactivity analysis. Vagueness analysis precludes the retroactive application of an interpretation if the underlying regulation suffers from impermissible levels of indefiniteness which prohibits sufficient notice.[94] Retroactivity analysis is also concerned with the problem of notice, but it seemingly permits retroactive application of a new law, notwithstanding notice problems, if the regulatory interest is sufficient to warrant that result.[95] Thus, in the context of regulatory interpretations, both the vagueness and retroactivity analyses examine the same problem, but seem to prescribe different review criteria.

B. *Inadequacies*

Current approaches are also inadequate because they fail to give judges meaningful standards by which to decide retroactivity issues. This is true of vagueness analysis. It is also true of retroactivity analysis. Although the *Chenery*[96] test identifies the two major components of retroactivity analysis, its standards are vague. The test gives the lower courts little guidance about how to evaluate the "ill effect" of, or the "regulatory interest" in, retroactivity. Instead, the courts have substantial freedom to permit or deny retroactive effect, and the outcome of a case depends on the judge's attitude[97] towards the public interests[98] and the ill effect of retroactivity.[99]

Some lower courts have partially remedied this deficiency in the *Chenery* test by developing more precise standards for applying

93 *Id.*

94 *See* note 49 *supra*.

95 *See* notes 33-44 *supra* and accompanying text.

96 332 U.S. 194 (1947).

97 Some agencies fare worse under the balancing test than others. One agency that has fared poorly is the NLRB. *See, e.g.*, Dow Chemical Co. v. NLRB, 660 F.2d 637, 655 n.14 (5th Cir. 1981); Drug Package, Inc. v. NLRB, 570 F.2d 1340, 1346-47 (8th Cir. 1978); NLRB v. Majestic Weaving Co., 355 F.2d 854, 861-62 (2d Cir. 1966). Its troubles are partially attributable to the fact that it rarely uses notice and comment procedures when creating new legal requirements. Rather it creates those rules on an ad hoc basis in administrative proceedings. *See* NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974); *Majestic Weaving, supra*. Although this procedure is permissible, *see Bell Aerospace*, 416 U.S. at 294; SEC v. Chenery Corp., 332 U.S. 194, 203 (1947), courts are generally hostile to it because of the potential for unfairness. *See, e.g., Majestic Weaving*, 355 F.2d at 860 ("There has been increasing expression of regret over the Board's failure to react more positively to the Supreme Court's rather pointed hint [in *Chenery*]" which encouraged the NLRB to use its notice and comment procedures more routinely.). As a result, courts have been quite willing to invalidate NLRB interpretations on retroactivity grounds. *Id.*

98 *See, e.g.*, Summit Nursing Home, Inc. v. United States, 572 F.2d 737, 743 (Ct. Cl. 1978); Adams Nursing Home of Williamstown, Inc. v. Mathews, 548 F.2d 1077, 1081 (1st Cir. 1977).

99 *See, e.g.*, Ruangswang v. INS, 591 F.2d 39, 44 (9th Cir. 1978); Diebold, Inc. v. Marshall, 585 F.2d 1327, 1335-39 (6th Cir. 1978); Louisiana v. Department of Energy, 507 F.

the test. The leading decision, *Retail, Wholesale and Dep't Store Union v. NLRB*,[100] involved, like *Chenery*, administrative precedent. The Court of Appeals for the District of Columbia Circuit identified the following factors as relevant to the problem of retroactivity:

> (1) [w]hether the particular case is one of first impression, (2) whether the new rule represents an abrupt departure from well established practice or merely attempts to fill a void in an unsettled area of law, (3) the extent to which the party against whom the new rule is applied relied on the former rule, (4) the degree of the burden which a retroactive order imposes on a party, and (5) the statutory interest in applying a new rule despite the reliance of a party on the old standard.[101]

Although these factors improve the *Chenery* test, they do not identify the full range of considerations. Nevertheless, the factors do improve the test and several courts have accepted and utilized them.[102]

C. *Effects*

The net effect of current federal court approaches to retroactivity is unclear. At times, they render regulatory requirements uncertain. The problem stems primarily from the courts' failure to grapple with basic interpretive issues. It is difficult to anticipate which interpretive rules will be applied in a given case and, therefore, difficult to predict how a regulation will be interpreted. But it is also difficult to predict whether an interpretation, when rendered, will be applied retroactively.[103]

Supp. 1365, 1376 (W.D. La. 1981), *rev'd sub nom.* Department of Energy v. Louisiana, 690 F.2d 180 (Temp. Emer. Ct. App. 1982), *cert. denied*, 460 U.S. 1069 (1983).

Montgomery Ward & Co., Inc. v. FTC, 691 F.2d 1322, 1333-34 (9th Cir. 1982), presents an unusual application of the *Chenery* balancing test. Although the court concluded that the Federal Trade Commission's (FTC's) interpretation did not involve an abrupt departure from prior practice, it refused to apply the interpretation retroactively. The court concluded that there was little public interest involved, and that the order imposed an undue burden on the petitioner even though the agency did not impose penalties. The court noted that the order permitted the application of penalties if petitioner failed to comply prospectively. The court held that this "penalty" was too severe because petitioner had many stores, and any one might be found in noncompliance. Moreover, it noted that petitioner's competitors were not subject to similar orders, and thus the order placed petitioner in an adverse competitive position. *But see* Local 900, Int'l Union of Elec., Radio & Mach. Workers v. NLRB, 727 F.2d 1184 (D.C. Cir. 1984).

100 466 F.2d 380 (D.C. Cir. 1972).

101 *Id.* at 390.

102 *See, e.g.*, Stewart Capital Corp. v. Andrus, 701 F.2d 846, 848-49 (10th Cir. 1983); Montgomery Ward & Co., Inc. v. FTC, 691 F.2d 1322, 1333-34 (9th Cir. 1982); Phillips Petroleum Co. v. Department of Energy, 449 F. Supp. 760, 797-98 (D. Del. 1978). *See also* McDonald v. Watt, 653 F.2d 1035, 1042-45 (5th Cir. 1981).

103 This uncertainty may be reduced by the presence of other factors. Once a regulatory scheme has been in effect for some time, many interpreting problems are resolved. It is also easier to predict how future problems will be resolved. But if the agency's regulatory

Uncertainties about the possible meaning and application of regulations can have important economic and regulatory implications. It is unclear what effect uncertainty has on the willingness of the regulated party to comply with regulatory schemes. Indeed, the effect may vary depending on the regulatory scheme, and the incentives created thereby, as well as on a myriad of other factors. In some instances, uncertainty may encourage overcompliance by causing companies to refrain from desirable economic activity which may or may not be prohibited, for fear that it might be proscribed.[104] In other instances, uncertainty may cause undercompliance because judges and agencies have broad discretion, not only in how to interpret regulations but also in determining their retroactive effect. If an enforcement action results, the regulated person may be able to avoid sanctions by persuading the reviewing court to

---

philosophy changes, it may render an unexpected interpretation. Moreover, when a new scheme is involved, accurate predictions can be difficult. In the early 1970's, for example, the Department of Energy's predecessor, the Cost of Living Council, promulgated the Mandatory Petroleum Price Regulations which regulated the price at which crude oil and refined petroleum products could be sold. Although this scheme was not entirely new, since it was based in part on World War II price regulations, there was substantial uncertainty about its meaning and application. This uncertainty generated much litigation about the meaning of the regulations; litigation that continues, even today, five years after the regulations were terminated by Executive Order.

Of course, the mere fact that courts apply a diverse set of interpretive principles does not render their results unpredictable. One can, if he understands the prevailing judicial attitude towards interpretation, make a fairly accurate prediction about which interpretive principles will be applied. One may be able to find patterns which indicate that certain principles are used more frequently than others. But predictions can be hazardous when federal administrative regulations are involved. The administrative agency may render initial interpretations, and it may be possible to ascertain the agency's regulatory bent and anticipate its response to a given interpretive problem. But such predictions are sometimes inaccurate, especially if the agency's regulatory philosophy changes or is modified. *See The Deference Rule*, *supra* note 12, at 612-14.

If a court renders the initial interpretation, accurate prediction becomes quite difficult. It is difficult to know before a suit is filed which judge will hear a case. One may plan to manipulate a case so that it comes before a judge with a favorable bent, but that plan may be thwarted. Even if the plan is successful and even if the judge gives a favorable interpretation, that interpretation may be overridden by an appellate court. One can base a prediction on general judicial attitudes toward interpretive problems, but this approach is perilous. Although one may be able to correctly predict the bent of the Supreme Court, it does not decide most cases. The hundreds of lower court judges may not have a prevailing philosophy about interpretive problems. Even if such a prevailing philosophy existed, the case might be decided by judges who do not adhere to that philosophy.

104 This tendency toward compliance is reflected in vagueness and overbreadth cases. In such cases the concern is that the threat of sanctions will deter individuals from engaging in constitutionally protected conduct. *See* Force, *supra* note 50, at 431 ("Concerning vagueness and overbreadth, specificity in legislation is a critical constitutional demand where it is necessary . . . to prevent people, in an abundance of caution, from abstaining from lawful activities for fear of breaking the law."); Ratner, *supra* note 50, at 1085; Stickgold, *Variations on the Theme of* Dombrowski v. Pfister: *Federal Intervention in State Criminal Proceedings Affecting First Amendment Rights*, 1968 WIS. L. REV. 369, 378-80. The same principle applies, however, in other areas. *See* R. POSNER, ECONOMIC ANALYSIS OF LAW 424 (2d ed. 1972).

adopt its own interpretation, or by persuading it not to apply the agency's interpretation retroactively.[105]

III. Suggestions

A. *A Review Model*

In order to eliminate these deficiencies, the federal courts must develop a principled approach to retroactivity problems. In order to do so, they must resolve certain basic issues. Preliminary issues are whether regulatory interpretations can create law and whether they can have retroactive effect. As indicated previously, the courts must resolve these issues affirmatively.[106] It cannot be disputed that the interpretive process is sometimes creative. Although the degree of creativity may vary from case to case and from one interpretive problem to the next, its existence is an established fact.[107]

Given that regulatory interpretations can create law, the courts then must decide whether and to what extent they should be given retroactive effect. One approach the courts could follow is to preclude all interpretations, newly announced or altered, from being applied retroactively. This approach would protect settled expectations and insure that everyone receives fair notice of regulatory requirements and has an opportunity to comply with those requirements.

Such an absolute prohibition against retroactivity would be extreme. In many instances new or altered interpretations are not novel or unanticipated,[108] and thus implicate only minimally the concerns associated with retroactivity. Moreover, an absolute rule

---

105 Judge Posner notes that:

> The incentive to obey a legal rule is, as we know, a function in part of the probability that a violation will be punished. If the rule is vague, prospective violators will discount the punishment cost of the violation not only by the probability that they will be caught but by the additional probability, significantly less than one, that the rule will be held applicable to the specific conduct in which they engaged. Thus the deterrent effect of the law is reduced.

R. POSNER, *supra* note 104, at 424 (footnotes omitted).

In several cases, judges purport to have observed such undercompliance. *See, e.g.*, Pennzoil Co. v. Department of Energy, 680 F.2d 156, 177 (Temp. Emer. Ct. App. 1982), *cert. denied*, 459 U.S. 1190 (1983): "Much less would we be inclined to [find unfairness, unreasonableness, or any other element of estoppel] on the facts here presented in favor of sophisticated oil field operators exploring the possibility of dubious regulatory leeway without even requesting an official interpretation." "[Pennzoil] knew from the regulations themselves that only an official interpretation by the General Counsel's Office could furnish any assurance for its course; it chose not to request one." 680 F.2d at 179. *See also* United States v. Exxon Corp., 561 F. Supp. 816, 848 (D.D.C. 1983) ("To estop the DOE would not only frustrate . . . important [national policy] objectives but would allow Exxon unjustly to reap huge profits from its dubious exploration of the limits of regulatory tolerance.").

106 *See* text accompanying notes 24-32 *supra*.

107 *Id.*

108 *See* text accompanying notes 148-51 and 189-91 *infra*.

against retroactivity would produce undesirable side effects. The regulated person would be discouraged from seeking interpretive guidance from the responsible agency. Until the agency or a court announced an interpretation and gave fair notice of its existence, the interpretation could not be applied to anyone. By seeking interpretive guidance, the regulated individual might alert the agency to an interpretive problem and prompt it to render an undesired interpretation.

Retroactivity is occasionally demanded by practical considerations. Problems may arise that were not anticipated by either the agency or the regulated person, creating a need for prompt action. Courts confronted by this problem adjudicate the issue, creating new rules as necessary. Agencies are frequently forced to do likewise, as the Supreme Court recognized in *Chenery*.[109] The Court stated:

> The function of filling in the interstices of the Act should be performed, as much as possible, through this quasi-legislative promulgation of rules to be applied in the future. But any rigid requirement to that effect would make the administrative process inflexible and incapable of dealing with many of the specialized problems which arise. . . .
>
> In other words, problems may arise in a case which the administrative agency could not reasonably foresee, problems which must be solved despite the absence of a relevant general rule. Or the agency may not have had sufficient experience with a particular problem to warrant rigidifying its tentative judgment into a hard and fast rule. Or the problem may be so specialized and varying in nature as to be impossible of capture within the boundaries of a general rule. In those situations, the agency must retain power to deal with the problems on a case-by-case basis if the administrative process is to be effective.[110]

This process of rule creation and retroactive application is not always unfair. Unfairness depends on the extent to which the interpretation is novel and unanticipated, as well as on the severity of its impact.

Retroactive application might be particularly necessary or appropriate when an initial interpretation proves to be totally unworkable or permits wholesale evasion of regulatory requirements. In such a situation, it may be desirable to replace that interpretation with a new one.[111] It may also be appropriate to purge the initial

109 332 U.S. 194 (1947).

110 *Id.* at 202-03 (citations omitted).

111 *See* Leedom v. International Bhd. of Elec. Workers, 278 F.2d 237, 240 (D.C. Cir. 1960):

> But in most areas of law, the need for predictability must compete with the need for change. Thus in reviewing legislation of retroactive effect, the virtues of stability must be balanced with the benefits of progress. Accordingly courts have often

interpretation immediately, especially if it produces particularly anomalous or undesirable results.[112]

While retroactivity may be necessary in some situations, courts still need to develop criteria for deciding when a retroactive effect should be permitted. Courts should not continue to use numerous, and at times inconsistent, approaches. They should start by abandoning the declaratory theory. It is outdated and simplistic. The courts could use the estoppel theory, but it does not provide the best approach. The notion that the government cannot be estopped is too deeply entrenched in the law,[113] and unduly encourages retroactivity. It forces courts to assume that the governmental interest overrides any private injury that may result.[114] Courts

---

upheld statutes which cut off or modified private contracts where it appeared that the legislation sought to attain social purposes of greater importance than predictability and reliance.

See also Local 719, International Prod., Serv. & Sales Employees Union v. McLeod, 183 F. Supp. 790, 793 (E.D.N.Y. 1960); Keeton, *Creative Continuity in the Law of Torts*, 75 HARV. L. REV. 463, 463-64 (1962); Slawson, *supra* note 4, at 225:

> Almost as obvious, however, is the fact that reliance can never be absolute, since the legal order must constantly change to fit new factual conditions or new conceptions of the common good. Reliance on existing rules, therefore, must be sacrificed to some extent to the need for change. It is this basic and simple conflict that is often overlooked in writing on retroactivity.

112 *See* Griswold, *supra* note 13, at 413 ("[I]n the absence of long-continuedness, the principle of non-retroactivity should yield to the necessities of the process of administrative formulation of a sound rule."). The situation is similar to that encountered by judges when they are forced to determine whether to give overruling precedent retroactive effect. Justice Traynor points out that:

> A bad precedent is doubly evil because it has not only inflicted hardship but threatens to continue doing so. When a judge resolves at last to overrule it, however, he confronts the immediate problem of how much reliance the precedent engendered. Reliance in one case of enormous repercussions? Reliance in many cases of small but cumulatively strong repercussions? No serious reliance at all in view of the mocking decisions attending a precedent? A judge is mindful that an overruling is normally retroactive but also mindful of the traditional antipathy toward retroactive law that springs from its recurring association with injustice. He must reckon with the possibility that a retroactive overruling could entail substantial hardship. He may nevertheless be impelled to make such an overruling if the hardship it would impose upon those who have relied upon the precedent appear not so great as the hardships that would inure to those who would remain saddled with a bad precedent. An immediate consideration will be that statutes of limitations, by putting an end to old causes of action, markedly cut down the number of possible hardship cases.

Traynor, *supra* note 21, at 540. *See also* Moody, *supra* note 14, at 443; *Prospective Application*, *supra* note 24, at 471.

113 *See* text accompanying notes 45-48 *supra* and compare with text accompanying notes 33-44 *supra*.

114 *See* Heckler v. Community Health Serv. of Crawford, Inc., 104 S. Ct. 2218, 2224 (1984):

> When the government is unable to enforce the law because the conduct of its agents have given rise to an estoppel, the interest of the citizenry as a whole in obedience to the rule of law is undermined. It is for this reason that . . . the Government may not be estopped on the same terms as any other litigant. . . . [W]e are

could place more emphasis on an interpretation's private impact and balance that impact against the regulatory interest. If that is done, estoppel analysis merges with retroactivity analysis.[115] Even then, estoppel analysis would not adequately respond to all retroactivity problems. Although that analysis may satisfactorily resolve problems relating to second impression interpretations, it remains inadequate when first impression interpretations are involved.[116]

The third approach, vagueness, may provide an adequate response. Indeed, the critical issue in most retroactivity cases is whether those subject to a regulation had fair notice that it might be so interpreted. Vagueness analysis also focuses on this issue.[117] But the judicial attitude toward vagueness claims renders that analysis unacceptable as the primary approach. As noted above, courts are extremely hostile to vagueness challenges except when the underlying regulation is being applied in a criminal context or implicates a fundamental constitutional right.[118] Thus, even though courts state that economic regulations must be sufficiently definite so that those of ordinary intelligence can ascertain what they mean,[119] in practice courts only inquire whether a provision is devoid of ascertainable standards.[120] One commentator, observing the pronounced tendency of courts to reject vagueness challenges

---

hesitant . . . to say that there are *no cases* in which the public interest in ensuring that the Government can enforce the law free from estoppel might be outweighed by the countervailing interest of some citizens in some minimum standard of decency, honor and reliability in their dealings with their Government.

115 The Supreme Court has suggested that estoppel considerations underlie retroactivity analysis. *See Heckler*, 104 S. Ct. at 2224 n.12 ("This principle [of estoppel] also underlies the doctrine that an administrative agency may not apply a new rule retroactively when to do so would unduly intrude upon reasonable reliance interests."). But this statement is questionable since estoppel cannot be applied to first impression interpretations. *See* note 45 *supra* and accompanying text. Moreover, even in cases of second impression interpretations, courts are less inclined to grant relief in estoppel cases than in retroactivity cases. Courts treat the two theories as distinct and apply them differently.

116 *See* note 45 *supra* and accompanying text.

117 One potential objection to vagueness analysis is that it may not adequately respond to the problem of second impression interpretations. Such interpretations present special problems because, even though a regulation does not seem to be unduly vague or ambiguous on its face, those subject to the regulation may have been encouraged to rely on a prior administrative interpretation. Vagueness analysis should be able to cope with this problem. Courts routinely hold that administrative interpretations can alleviate vagueness problems, and might similarly hold that such interpretations can exacerbate a provision's indefiniteness. Lower courts have held that agency confusion can provide evidence to buttress a vagueness claim.

118 *See* text accompanying notes 52-65 *supra*.

119 *See, e.g.*, Connally v. General Constr. Co., 269 U.S. 385, 391 (1926); United States v. Batson, 706 F.2d 657, 679 (5th Cir. 1983); Diebold, Inc. v. Marshall, 585 F.2d 1327, 1335-36 (7th Cir. 1978); Brennan v. OSHRC, 505 F.2d 869, 872 (10th Cir. 1974).

120 *See, e.g.*, Boutilier v. INS, 387 U.S. 118, 123 (1967) ("It is true that this Court has held the 'void for vagueness' doctrine applicable to civil as well as criminal actions . . . . However, this is where 'the exaction of obedience to a rule or standard . . . was so vague and indefinite as really to be no rule or standard at all . . . .'" This language is dicta

in economic cases, noted that the few instances in which the doctrine has been applied can be explained as historical aberrations.[121] Although this view has been disputed,[122] it is clear that courts rarely

---

because the court concluded that it was unnecessary to reach the vagueness issue.); Champlin Ref. Co. v. Corporation Comm'n of Okla., 286 U.S. 210, 243 (1932):

> These general words and phrases are so vague and indefinite that any penalty prescribed for their violation constitutes a denial of due process of law. It is not the penalty itself that is invalid but the exaction of obedience to a rule or standard that is so vague and indefinite as to be really no standard at all.

Several commentators agree. Collings points out that:

> Some of the language in the *Connally*, *Cohen Grocery*, and *Cline* decisions seems to suggest that a statute may be objectionable merely because of a possibility that different juries may reach varying results in its application. As a result a makeweight argument is often advanced by defendants to the effect that a statute is unconstitutionally vague because of the possibility of varying results. As might be expected the Court makes short work of such contentions. Obviously few criminal provisions would be constitutional if they were to be condemned merely because in some borderline cases there would be no certainty as to the jury decision . . . . In view of these cases one must conclude that the presence of difficult borderline or peripheral cases will not invalidate a statute at least where there is a hard core of circumstances to which the statute unquestionably applies and as to which the ordinary person would have no doubt as to its application.

Collings, *supra* note 49, at 205-06. Collings offers the following cases in support of his conclusions: Jordan v. DeGeorge, 341 U.S. 223, 231 (1951) ("difficulty in determining whether certain marginal offenses are within the meaning of the language under attack as vague does not automatically render a statute unconstitutional for indefiniteness"); United States v. Ragen, 314 U.S. 513, 523 (1942) ("[The] mere fact that a penal statute is so framed as to require a jury upon occasion to determine a question of reasonableness is not sufficient to make it too vague to afford a practical guide to permissible conduct."); United States v. Wurzbach, 280 U.S. 396, 399 (1930):

> Whenever the law draws a line there will be cases very near each other on opposite sides. The precise course of the line may be uncertain, but no one can come near it without knowing that he does so, if he thinks, and if he does so it is familiar to the criminal law to make him take the risk.

121 Amsterdam points out that:

> The primary thesis advanced here is that the doctrine of unconstitutional indefiniteness has been used by the Supreme Court almost invariably for the creation of an insulating buffer zone of added protection at the peripheries of several of the Bill of Rights freedoms. With regard to one class of cases, those involving potential infringement of first amendment privileges, this buffer zone principle has always been expressly avowed in the Court's opinions and recognized by the commentators . . . . [T]he "true" uncertainty cases . . . when seen in their historical perspective . . . date from an era when economic laissez faire was for the Court the sanctum sanctorum that free speech has become today . . . .

Amsterdam, *supra* note 49, at 75-77 (footnotes omitted). *See also* Collings, *supra* note 49, at 213; Douglas, *The Bill of Rights is Not Enough*, 38 N.Y.U. L. REV. 207 (1963); Comment, *Legislation-Requirement of Definiteness in Statutory Standards*, 53 HARV. L. REV. 264 (1954). The doctrine was also invoked by the Warren Court. *See* Kurland, *Egalitarianism and the Warren Court*, 68 MICH. L. REV. 629, 667 (1970) ("The Warren Court, in particular, had been more stringent in imposing on the state legislatures and on Congress a duty to cross their t's and dot their i's in their statutes lest they find those statutes struck down for vagueness.").

122 Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, 74 YALE L.J. 775, 844-45 (1965):

> It has been suggested that the void-for-vagueness doctrine has usually been employed by the Supreme Court to create an added zone of protection around certain Bill of Rights freedoms. *International Harvester* and *Cohen* are, under this view,

invalidate economic regulations on vagueness grounds.[123] Most courts reject vagueness claims after only perfunctory discussion,[124] even when a very vague law is involved.[125]

Since vagueness analysis is constitutionally mandated, it cannot be ignored. But it can be supplemented by retroactivity analysis. This supplementation is appropriate. Even though regulations may not be "devoid of ascertainable standards," interpretations can still be unanticipated and can perpetuate unfairness.[126] Retroactivity analysis could dispel this unfairness. The process would entail two steps. First, courts would examine a regulation to determine whether it meets minimal levels of definiteness. If it does not, courts could refuse to give it retroactive effect. If it does, they could apply retroactivity analysis to determine whether it is fair or appropriate to apply the interpretation retroactively.

This approach is consistent with the underpinnings of both vagueness and retroactivity analyses. Vagueness analysis is constitutionally required by the due process clause.[127] Retroactivity analysis, on the other hand, is not constitutionally required.[128] Rather,

---

reduced in large part to the status of historical curiosities left over from 'an era when economic laissez faire was for the Court the sanctum sanctorum that free speech has become today.' Since economic freedom is not noticeably a sanctum sanctorum for the present Court, this theory may be read too broadly to mean that uncertainty in an antitrust statute, even a criminal antitrust statute such as the Sherman Act, would not today cause great concern, and, therefore, that Brandeis' rule of reason might now be acceptable. The Court's 1963 decision in United States v. National Dairy Products Corp., however, indicates that this is not the case, and the Court continues to refuse to tolerate lack of standards, even in an economic regulation.

In the latter case, National Dairy Prod. Corp. v. United States, 372 U.S. 29 (1963), the Court did not invalidate the statute, but did narrow it by construction.

123 *See, e.g.*, Exxon Corp. v. Busbee, 644 F.2d 1030, 1034 (5th Cir.), *cert. denied*, 454 U.S. 932 (1981); Precious Metals Assocs., Inc. v. Commodity Futures Trading Comm'n, 620 F.2d 900, 906-07 (1st Cir. 1980); General Dynamics v. OSHRC, 599 F.2d 453, 464 (1st Cir. 1979).

124 *See, e.g*, Ray Evers Welding Co. v. OSHRC, 625 F.2d 726, 732 (6th Cir. 1980); McLean Trucking Co. v. OSHRC, 503 F.2d 8, 10-11 (4th Cir. 1974); Ryder Truck Lines, Inc. v. Brennan, 497 F.2d 230, 233-34 (5th Cir. 1974).

125 *See, e.g.*, Brennan v. OSHRC, 505 F.2d 869, 871-73 (10th Cir. 1974).

126 *See* text accompanying notes 25-32 *supra*.

127 *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 10-8, at 512-13 (1978).

128 The earliest decision, at the federal level, is Great N. Ry. Co. v. Sunburst Oil & Ref. Co., 287 U.S. 358, 364-65 (1932). The U.S. Supreme Court held that the Montana Supreme Court could reverse prior precedent, but could apply the reversal only prospectively. The Court concluded, in dicta, that a court could apply new precedent retroactively although a party may have relied on the prior precedent. Justice Cardozo noted that: "This is not a case where a court in overruling an earlier decision has given to the new ruling a retroactive bearing, and thereby has made invalid what was valid in the doing. Even that may often be done, though litigants not infrequently have argued to the contrary." *Id.* at 364.

Although the *Sunburst* case involved a state court decision, similar decisions have been rendered regarding the validity of federal judicial precedent. *See* Chevron Oil Co. v. Hu-

courts apply it as a matter of judicial discretion.[129] Indeed, when retroactivity analysis developed, the debate centered on whether it was constitutionally permissible,[130] rather than on whether it was constitutionally compelled.[131] Thus, although a regulation satisfies

son, 404 U.S. 97, 105-07 (1971). Moreover, the Supreme Court has extended this analysis to regulatory precedent. *See* SEC v. Chenery Corp., 332 U.S. 194, 203 (1947).

The Court supported Cardozo's statements in *Sunburst* in Linkletter v. Walker, 381 U.S. 618, 628-29 (1965). The Court confronted the question of whether its own precedent in the criminal procedure area should be applied retroactively. In resolving that issue, the Court applied a *Chenery*-like test which it derived from *Sunburst*. It went on to note that this test was neither constitutionally compelled nor constitutionally prohibited:

> It is true that heretofore, without discussion, we have applied new constitutional rules to cases finalized before the promulgation of the rule. Petitioner contends that our method of resolving these prior cases demonstrates that an absolute rule of retroaction prevails in the area of constitutional adjudication. However, we believe that the Constitution neither prohibits nor requires retrospective effect. As Justice Cardozo said, "We think the federal constitution has no voice upon the subject."
>
> Once the premise is accepted that we are neither required to apply, nor prohibited from applying, a decision retrospectively, we must then weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation. We believe that this approach is particularly correct with reference to the Fourth Amendment's prohibitions as to unreasonable searches and seizures. Rather than "disparaging" the Amendment we but apply the wisdom of Justice Holmes that "[t]he life of the law has not been logic: it has been experience." Holmes, The Common Law 5 (Howe ed. 1963).

Id. at 628-29 (footnotes omitted). However, the Court's statement that retroactivity analysis is not constitutionally compelled is dicta.

129 Several lower court decisions support this view of retroactivity. *See* Leedom v. International Bhd. of Elec. Workers, 278 F.2d 237, 241 (D.C. Cir. 1960) ("as a matter of equitable discretion, courts will apply a judgment overruling a prior decision only prospectively in order to avoid gross injustice"); NLRB v. Guy F. Atkinson Co., 195 F.2d 141, 148-49 (9th Cir. 1952):

> Courts, in making ad hoc adjudications, regularly apply rules and doctrines not previously announced, to prior conduct of the parties. On occasions they have chosen to exercise an inherent power to give their pronouncements prospective operation only, but they are not required by any constitutional limitation to do so, and they ordinarily do not. We assume that an adjudication by an administrative board is likewise not limited to prospective operation only by any fundamental requirement of due process.

See also United States v. Rundle, 255 F. Supp. 936, 949-50 n.7 (E.D. Pa. 1966).

130 Since the Constitution only permits the federal courts to hear "cases and controversies," U.S. CONST. art. III, § 2, it was questionable whether a court could announce a new rule and give it purely prospective effect. *See* Schaefer, *The Control of "Sunbursts": Techniques of Prospective Overruling*, 42 N.Y.U. L. REV. 631 (1967). By giving a new rule purely prospective effect, the court may be rendering what is tantamount to an advisory opinion, something which is prohibited. *See* Aetna Life Ins. Co. v. Haworth, 300 U.S. 227 (1937). Even Cardozo, who developed the technique of prospective overruling, felt compelled to address the issue of its constitutionality. Address by Benjamin Cardozo before the New York State Bar Ass'n, Jan. 22, 1932, 55 N.Y. ST. B. ASS'N. REP. 263, 295 (1932) [hereinafter cited as Cardozo Address].

131 Cardozo suggested a resolution to the problem: a court applies the old rule in the case before it, and announces the new rule as dicta. Thus, the new rule is not binding in the sense that it resolves the initial case. But it does give warning as to how similar problems will be resolved in the future, and thereby eliminates allegations that subsequent applica-

constitutional requirements, courts remain free to deny retroactive effect to interpretations of that regulation when discretionary considerations demand it.

Vagueness and retroactivity analyses do overlap somewhat. The same remedies are available for both theories. Under retroactivity analysis, if a court decides that it is inequitable to apply a new interpretation retroactively, it holds that the interpretation may only be applied prospectively.[132] This same remedy can be used, in appropriate cases, under a vagueness analysis. If the court does not invalidate the regulation on its face, it holds that the interpretation is invalid as applied because those subjected to it were not given fair notice.[133] The interpretation can still be applied in the future to those who were given fair notice. Moreover, after the court's decision, all should have notice as to the interpretation.

The need for, and impact of, retroactivity analysis will vary. In the economic context, where vagueness review is minimal, it may have a significant impact. On the other hand, when interpretations impinge on first amendment rights or involve criminal sanctions, retroactivity analysis may have little effect. Retroactivity analysis requires a stricter analysis in these situations, and may make it more difficult to sustain a retroactive effect. But vagueness analysis demands higher levels of definiteness and notice as well. Thus, retroactivity analysis primarily affects interpretations of economic regulations and as such, it is arguably unnecessary. Vagueness analysis provides less protection to economic interests because they merit less protection. But even economic interests deserve fair notice of regulatory requirements.[134] As a practical matter, most courts de-

---

tions of the new rule were unanticipated. *See* Cardozo Address, *supra* note 130, at 295. *See also* Note, *Prospectivity and Retroactivity of Supreme Court Constitutional Interpretations*, 5 U. RICH. L. REV. 129, 130-31 (1970).

132 In the administrative area, courts normally use only one of two options: they give the interpretation retroactive effect, or they give it prospective effect. Courts will, in applying retroactivity analysis to their own precedent, sometimes exercise a third option: apply the new rule to the case before it, but otherwise apply the rule prospectively. *See* Moody, *supra* note 14. This approach makes the new rule binding and not merely dicta.

133 If a court concludes that a provision is constitutionally vague or indefinite, it may invalidate the regulation, either on its face or as applied, depending on the interpretation's impact. If the court invalidates the interpretation as applied, the interpretation may still be applied prospectively. The court's decision only precludes the interpretation's retroactive application. *See, e.g.*, United States *ex rel.* Reed v. Lane, 759 F.2d 618, 622-23 (7th Cir. 1985); Logan v. Auger, 428 F. Supp. 396, 403 (S.D. Iowa 1977). *See also* Amsterdam, *supra* note 49, at 109; Note, *Void For Vagueness: An Escape From Statutory Interpretation*, 23 IND. L.J. 272, 273 (1948).

134 Collings, *supra* note 49, points out that:

> Unquestionably the consequences of protecting the civil liberties of Communists and purveyors of lewd books and motion pictures is to further the civil liberties of us all. But are not economic liberties also important? Business men and corporations perform useful functions. Why not also require definiteness in statutes relating to them? Certainly no one can quarrel with the principle that any

mand fair notice even when interpretations have purely economic effect. When courts are confronted with retroactive interpretations which perpetrate unacceptable levels of unfairness, they find a way to invalidate the retroactive effect. Although they may accomplish that result through retroactivity analysis, they sometimes accomplish it by rejecting the interpretation through an indirect challenge.[135]

This is not to suggest that the indirect challenges should be discarded. Courts can, and undoubtedly do, retain the authority to consider the basic issues presented by those challenges: whether an interpretation is correct, and whether it should be given deference.[136] But the courts should resolve these issues without considering the potential retroactive effect of an interpretation. Even though a court decides to defer to an interpretation, it can remedy that effect by decreeing that the interpretation may only be applied prospectively.

The tendency of some courts to invalidate interpretations, rather than merely refuse retroactive effect, has an adverse impact on the administrative process. If, because of concerns about an interpretation's potential retroactive effect, a court strikes down an administrative interpretation and substitutes its own, the agency cannot apply the later interpretation even to future transactions. In order to adopt that interpretation which may have been permissible under the regulation, the agency must amend the original rule. It would be preferable for the court to rule on the validity of the interpretation as a preliminary matter, uninfluenced by its retroactive effect.[137] Then, if retroactive application is unwarranted, the court

---

statute whether criminal or civil should be sufficiently certain to inform those subject to it of the conduct which is required and to guide the judge and jury in its application.

Id. at 233.

135 *See, e.g.*, Pennzoil Co. v. Department of Energy, 680 F.2d 156, 175 (Temp. Emer. Ct. App. 1982); Sauder v. Department of Energy, 648 F.2d 1341, 1346 (Temp. Emer. Ct. App. 1981).

136 *See The Deference Rule*, *supra* note 12, at 587, 606-07. However, the indirect challenges should be applied in a coherent and principled manner. Courts should not continue to apply a diverse set of interpretive rules that permit and encourage inconsistent decision-making. Instead, they should develop a sound interpretive process. In order to do so, they must first resolve several basic issues. First, they must develop principles on which to base the process. *See generally An Overview*, *supra* note 12. Second, they must decide whether, and to what extent, administrative interpretations should be given deference. *See generally The Deference Rule*, *supra* note 12. Finally, they must reconcile the concept of deference with other rules of construction. *Id.* at 597-600.

137 *See* American Trucking Ass'n v. Atchison, T. & S.F. Ry. Co., 387 U.S. 397, 416 (1967), where the Court stated:

> We agree that the Commission, faced with new developments or in light of reconsideration of the relevant facts and its mandate, may alter its past interpretation and overturn past administrative rulings and practice. . . . In fact, although we make no judgment as to the policy aspects of the Commission's action, this kind of

could refuse it.[138]

B. *Evaluation Criteria*

If courts choose to apply retroactivity analysis to regulatory interpretations, they must develop more precise standards for determining when retroactivity should be permitted. The standards articulated by the Supreme Court in *Chenery*, the "ill effect of retroactivity" and the "regulatory interest" in applying the interpretation retroactively, identify the proper criteria.[139] They are, however, vague and inadequate. The factors articulated by the Court of Appeals for the D.C. Circuit in the *Retail, Wholesale* case improve upon the *Chenery* standards, but remain inadequate. Although more precise standards are desirable, they are difficult to formulate. Circumstances may vary significantly from case to case and force courts to use a generalized balancing test. Such a test leaves judges with broad discretion. Some attempt can be made, however, to identify criteria which should limit or control the exercise of that discretion.

1. The "Ill Effect" of the Retroactivity

The "ill effect" prong of the *Chenery* balancing test should be subject to several qualifications and limitations. Retroactive applications of regulatory interpretations can result in ill effects because they can defeat a person's expectations about a regulation's meaning and application. The mere fact that one has an "expectation" does not mean, however, that it deserves protection. Some expectations are legitimate, and therefore worthy of protection, while others are not. Courts must evaluate the legitimacy of the expectation as well as the severity of the interpretation's impact, and balance these determinations against the regulatory interest advanced by the agency.

As a threshold matter, a person should be required to demonstrate that he actually had certain expectations about a regulation's meaning which were different from the challenged interpretation,

---

flexibility and adaptability to changing needs and patterns of transportation is an essential part of the office of a regulatory agency. Regulatory agencies do not establish rules of conduct to last forever; they are supposed, within the limits of the law and of fair and prudent administration, to adapt their rules and practices to the Nation's needs in a volatile, changing economy. They are neither required nor supposed to regulate the present and the future within the inflexible limits of yesterday.

See also Moody, *supra* note 14, at 493; *Prospective Application, supra* note 24, at 471.

138 *See* text accompanying notes 33-44 *supra*.

139 *See* text accompanying notes 33-35 *supra*.

and that he relied on those expectations.[140] Litigants who made no attempt to ascertain the regulatory requirements will not satisfy this requirement.[141] Moreover, litigants who were intent on a particular course of conduct regardless of the law will not satisfy the requirement either.[142] In these instances, a court may apply an interpretation retroactively. The retroactivity does not impinge on reliance

140 For example, in Local 900, Int'l Union of Elec., Radio and Mach. Workers v. NLRB, 727 F.2d 1184, 1195 (D.C. Cir. 1984), the court stated:

> Neither does the union fare well on the third factor—reliance. The union's superseniority clause was last modified in 1975, the year in which *Dairylea* was decided. There is no evidence that the union considered, much less relied on, *Dairylea* in writing this clause. Local 900 would have us infer reliance on *Limpco* and *Otis Elevator* simply because those cases allowed superseniority for recording secretaries. In affirming the Board's decision in *Limpco*, however, the Third Circuit found it crucial that the officer participated in grievance processing, . . . a fact not present here, and *Otis Elevator* was not reviewed by a court. Any reliance the union may have placed on those decisions, therefore—remembering that none was shown—was not altogether well placed.

In Marks v. Higgins, 213 F.2d 884, 889 (2d Cir. 1954), the court noted that:

> The facts here show an absence of reasonable reliance by the settlor on the 1934 ruling, even if it be considered valid. For, as already noted, previous to his death, . . . two regulations . . . superseded the 1934 ruling, and specifically interpreted the statute as covering a trust containing a contingent life estate of the kind he reserved. The settlor thus had ample warning, and had ample time, to divest himself of his contingent life interest.

See also Elkins v. Commissioner, 81 T.C. 669, 681-82 (1983) (The tax court decided that the Commissioner of Internal Revenue's interpretation of a provision could not be retroactively applied against someone who had relied on that interpretation. However, the court refused to grant summary judgment because there remained the question of whether petitioner had, in fact, relied.); Corr, *supra* note 8, at 773-79.

141 Most discussions of the problem have involved reliance on overruled judicial precedent. On that subject Justice Cardozo stated his "impression that the instances of honest reliance and genuine disappointment are rarer than are commonly supposed to be by those who exalt the virtues of stability and certainty." Cardozo Address, *supra* note 130, at 295. *See also Prospective Overruling*, *supra* note 2, at 945-46:

> [T]he element of surprise will not realistically be an operative factor in a great many cases because the parties will have acted without any knowledge at all of what the governing law was; whatever law is finally held to govern their conduct, whether it be the old rule or the new rule, will be a new rule to them. This is something of what Cardozo meant when he wrote, "The picture of the bewildered litigant lured into a course of action by the false light of a decision, only to meet ruin when the light is extinguished and the decision is overruled, is for the most part a figment of excited brains."

142 *See* NLRB v. National Container Corp., 211 F.2d 525, 534 (2d Cir. 1954):

> Moreover, National's claimed reliance on the old waiver rule is not supported by the record. In addition, National, in its exceptions to the Regional Director's report of the objections to the election, filed several months after the contract with Local 444 was entered into, did not assert that the objections had been waived by Local 1, but merely contended that they were not supported by substantial evidence; and, instead of requesting a dismissal of the objections as being filed too late, National requested a hearing on the merits. Local 444 makes no claim that it relied on the Board's waiver rule. In the absence of reliance upon such rule, neither National nor Local 444 can show prejudice by reason of the change of the rule.

interests.[143]

Several commentators have questioned the desirability of the actual reliance requirement.[144] One objection raised is that this requirement deprives the law of predictability because a law might be applied one way when there is no reliance, and another way when there is reliance. Although this analysis is correct in that an interpretation might be applied in differing ways depending on whether or not reliance exists, this does not make the law unpredictable. Those who seek to learn the law's requirements and to act accordingly will find that the law is relatively predictable. Predictability is only important to those who seek to learn the law and to act according to its dictates. Those who do so deserve, and receive, more protection under retroactivity analysis. On the other hand, those who have acted without regard for regulatory requirements have evidenced a lack of regard for the law's predictability. In this latter situation, the public's interest in applying the interpretation retroactively should predominate.

A second objection raised is that the reliance requirement tends to encourage litigation, thus consuming judicial time in resolving expectation claims. Although this objection is correct in some cases, the consumption may be justifiable. In some instances, litigation will occur under the regulations, and the retroactivity issue will be merely one of many issues to be resolved. Furthermore, the public interest may justify this expenditure of judicial resources. As discussed in the prior paragraph, the law may appropriately dis-

---

These problems also arise with retroactively applied statutes. *See* Slawson, *supra* note 4, at 219. *See also* Bradley v. School Bd. of Richmond, 416 U.S. 696, 721 (1974). In giving retroactive effect to a statute, the Court noted, *inter alia*, that:

> Even assuming a degree of uncertainty in the law at that time regarding the Board's constitutional obligations, there is no indication that the obligation under § 718 [to pay attorneys' fees], if known, rather than simply the common-law availability of an award, would have caused the Board to order its conduct so as to render this litigation unnecessary and thereby preclude the incurring of such costs.

Id. at 721.

143 One who claims to have relied on an alternate interpretation of the law should be subject to discovery on that issue. In Exxon Corp. v. Department of Energy, 91 F.R.D. 26, 41 (N.D. Tex. 1981), Exxon claimed that its interpretation, which was different than the one ultimately adopted by the agency, had been formulated in good faith reliance on existing interpretive materials. The Department responded with discovery requests designed to test Exxon's assertions. Exxon, which as it turned out had not acted in good faith, sought to resist discovery on the basis that the requested documents were protected by the attorney-client privilege. The court ordered discovery, however, noting that Exxon's assertions of good faith waived the privilege. *See* United States v. Exxon Corp., 561 F. Supp. 816, 848 (D.D.C. 1983).

144 Some commentators have argued that the actual reliance requirement is unsound. *See* Schaefer, *supra* note 130, at 642-43. *See also Prospective Application, supra* note 24, at 479; *Prospective Overruling, supra* note 2, at 949; Note, *Prospective Operation of Decisions Holding Statutes Unconstitutional or Overruling Prior Decisions*, 60 HARV. L. REV. 437, 440 (1947) [hereinafter cited as *Prospective Operation*].

tinguish between those who have relied on the prior state of the law and those who have not, and only provide relief to the former. Moreover, if the actual reliance issue becomes too cumbersome because of, for example, proof problems, administrative officials may choose not to press it. But they should have the option of pressing that issue before the court as circumstances warrant.

Once a person demonstrates that he has expectations about a regulation's meaning, a reviewing court must examine those expectations to determine whether they are reasonable. Thus, at the minimum, a court should require a litigant to show that the agency's interpretation "changed" the law in some manner.[145] If the challenged interpretation does not affect the law, but is merely the latest in a long series of interpretations all reaching the same result,[146] it is entitled to little protection. Demonstrating that an interpretation "changed" the law would not be difficult in most cases. As noted above, when an interpretation qualifies, expands, or restricts a regulation, it can be treated as law creating.[147]

Even though an interpretation may alter the law, it may have been unreasonable to rely on an alternate interpretation. If the interpretation is one of first impression, private expectations will be unreasonable if the person should have anticipated the agency's interpretation. Frequently, a new interpretation is not novel in any sense. Rather, it is presaged by the regulation's language and regulatory history,[148] judicial or administrative precedent,[149] or by prior

145 *See* Corr, *supra* note 8, at 763.

146 *See Prospective Operation*, *supra* note 144, at 441.

147 *See* text accompanying notes 25-32 *supra*. When an interpretation overrules a prior interpretation and substitutes a new rule in its place, law has been created. It can be argued that a prior interpretation which is merely administrative, and not yet approved by a court, does not constitute law. Courts are not required to accept administrative interpretations, but when they do ratify such an interpretation, it becomes "law."

148 *See* Department of Energy v. Louisiana, 690 F.2d 180, 191 (Temp. Emer. Ct. App. 1982), *cert. denied*, 460 U.S. 1069 (1983):

> There is nothing confusing in the wording as applied to our specific problem. Plaintiffs knew that they were using a different interpretation in determining whether the oil being produced was old or new. . . . The history of the regulations, rulings and interpretations demonstrates that there was no justification for their position.

See also Pennzoil Co. v. Department of Energy, 680 F.2d 156, 175 (Temp. Emer. Ct. App. 1982) (The court adopted the agency's interpretation of a regulation and applied that interpretation retroactively. Pennzoil's assertion that retroactive application would be unfair was rejected because the interpretation was implicit in the regulatory scheme.), *cert. denied*, 459 U.S. 1190 (1983); Nicholson v. Brown, 599 F.2d 639, 648-49 (5th Cir. 1979) ("The criteria that the review panel relied upon seem to us entirely reasonable glosses on the term 'community essentiality.' They are not such a new departure that they could not reasonably have been foreseen.").

149 *See* Saint Francis Memorial Hosp. v. United States, 648 F.2d 1305, 1311 (Ct. Cl. 1981):

> There is no evidence, and we have no reason to believe, that Saint Francis made any such inquiry, but the fact is that the Secretary had already expressed his opin-

agency action.[150] If the interpretation is not novel, then, absent other circumstances, a person's reliance claim is not compelling.[151]

Not all interpretations are foreshadowed by regulatory history, precedent, or agency action. A regulation may suffer from vagueness or ambiguity, and the responsible agency may not have taken any position regarding its meaning and application. Those subject to the regulation are, therefore, faced with uncertainty. The *Retail, Wholesale* factors[152] suggest that, in this situation, retroactivity is generally unobjectionable. This conclusion is probably correct because the regulated person faced with uncertainty can protect himself[153] by seeking interpretive guidance from the responsible agency.[154]

---

ion plainly on the precise issue in Intermediary Letter No. 51. . . . The strong likelihood is that, if plaintiff had made proper inquiry, the intermediary or the Department would have responded that the Secretary expressly considered capitalization the proper method to account for the interest paid during the construction period for Saint Francis' replacement facility. If plaintiff had thus discovered the Secretary's position—as we think it should and would have—it could have taken the steps it now says it would have taken if it had earlier learned the Secretary's view . . . .

150 *See* EEOC v. Puget Sound Log Scaling & Grading Bureau, 752 F.2d 1389 (9th Cir. 1985) (In interpreting a statute rather than a regulation, the court found the reliance unreasonable because a prior administrative interpretation signaled the agency's ultimate position. Moreover, holdings of the Supreme Court and the lower federal courts on related matters warned of the interpretation that was retroactively applied.). *See also Prospective Operation*, *supra* note 144, at 441.

151 This statement is undercut by the fact that the interpretive process is frequently unpredictable. *See* notes 12-13 *supra*.

152 *See* text accompanying note 101 *supra*.

153 *See, e.g.*, Cheshire Hosp. v. New Hampshire-Vermont Hospitalization Serv., 689 F.2d 1112, 1122 (1st Cir. 1982) (appellant relied on what it claimed was the settled industry interpretation of a regulation; the court concluded that "even if there was a settled industry understanding, this understanding could not be transformed into settled law in the absence of some indication that the Secretary concurred in this understanding"); Pennzoil Co. v. Department of Energy, 680 F.2d 156, 173-74 (Temp. Emer. Ct. App. 1982), *cert. dismissed*, 459 U.S. 1190 (1983): "[Appellant suggests that] if there are two reasonable interpretations of a regulation, only the alternative selected by the regulated entity, and not the one selected by the agency, may be given retroactive effect by the courts." The court rejected appellant's contention, noting that:

> [T]o deny deference in accepting the agency's interpretation simply because another interpretation, strained or not, was indulged in by an operator out of self-interest would substitute for the rule of deference to agency action a rule of deference to that of a producer. This would stand the rule of deference literally on its head.

Id. at 174; Saint Francis Memorial Hosp. v. United States, 648 F.2d 1305, 1311 (Ct. Cl. 1981) ("Reliance on one's own interpretation of an imprecise regulation does not create an entitlement based on that interpretation, or a violation of due process when the administrator or court adopts another reading.").

154 Saint Francis Memorial Hosp. v. United States, 648 F.2d 1305, 1311 (Ct. Cl. 1981):

> We believe that, faced as it was with a new problem for which the regulations did not give any clear answer and the opposing position had real substance, plaintiff could not proceed on its own without taking the chance that the Secretary might later adopt the different view (and the courts uphold it). Plaintiff should, at the

The obligation to seek guidance from the agency is fully consistent with the requirement, imposed by most regulatory schemes, that those subject to a regulation take affirmative steps to ascertain its meaning.[155] Moreover, the alternative of allowing the regulated person to adopt and rely on his own interpretations would encourage manipulation of, and undercompliance with, regulatory requirements.[156]

The duty of inquiry, however, should not be imposed in all instances.[157] Situations will arise in which no doubt exists as to a

---

least, have made an inquiry to its intermediary or the Secretary, seeking clarification or amplification of the statute and regulations.

See Diebold, Inc. v. Marshall, 585 F.2d 1327, 1337 (6th Cir. 1978) ("a duty of inquiry may properly be imposed on those engaged in business enterprises, as they should be alert to the probability that their conduct is of interest to one or more administrative agencies"). *See also* Department of Energy v. Louisiana, 690 F.2d 180, 191 (Temp. Emer. Ct. App. 1982) ("[Plaintiffs] never sought an agency interpretation to sustain their position. Rather, they seem to have proceeded on the theory that their interpretation was reasonable and that it would afford them protection against such a claim as now being made by the DOE. This, of course, is no defense."), *cert. denied*, 460 U.S. 1069 (1983).

An exception exists for those rare regulatory schemes which give participants discretion to determine how their requirements should be applied. In Kentucky v. Secretary of Educ., 717 F.2d 943 (6th Cir. 1983), *rev'd sub nom.* Bennett v. Kentucky Dep't of Educ., 105 S. Ct. 1544 (1985), a federal statute and implementing regulations provided funds for "educationally deprived children." It also provided that states could only use those funds to supplement, not supplant, state and local funds used for that purpose. 717 F.2d at 944. The Commonwealth designed special readiness classrooms for its deprived children in which the per pupil expenditure was less than normal, but the overall cost was greater. The Commonwealth did not eliminate any other programs for these students. *Id.* at 946.

The Secretary of Education concluded that Kentucky's program was not consistent with the statute and regulations. However, the Sixth Circuit refused to give the Secretary's interpretation retroactive effect. The court noted that the regulatory requirements were not sufficiently clear or definite as to whether the Commonwealth had been given a specific grant of discretion to develop and administer programs it believed to be consistent with the Act, and that the Commonwealth's interpretation was a reasonable one. The court also noted that there was no evidence of bad faith. *Id.* at 948.

155 *See* Heckler v. Community Health Serv. of Crawford County, Inc., 104 S. Ct. 2218, 2226 (1984) ("As a participant in the Medicare program, respondent had a duty to familiarize itself with the legal requirements for cost reimbursement."); Emery Mining Corp. v. Secretary of Labor, 744 F.2d 1411, 1416 (10th Cir. 1984) ("Particularly where mandatory safety standards are concerned, a mine operator must be charged with knowledge of the Act's provisions and has a duty to comply with those provisions."); Diebold, Inc. v. Marshall, 585 F.2d 1327, 1337 (6th Cir. 1978).

156 *See* text accompanying note 105 *supra*. *See also* Mishkin, *supra* note 14, at 72.

157 *See* New England Power Co. v. NRC, 683 F.2d 12 (1st Cir. 1982). Under prior practice, an application for a permit would not incur a processing fee if it were withdrawn. In 1978, the Nuclear Regulatory Commission (NRC) issued a new fees regulation. It did not expressly mention withdrawn applications, but the agency construed the regulation as allowing it to assess fees against such applications. The First Circuit held that the agency's interpretation, although permissible, could not be retroactively applied; the agency's actions did not give adequate notice that the regulation changed prior practice and allowed the imposition of fees on withdrawn applications. *See also* Cheshire Hosp. v. New Hampshire-Vermont Hosp. Serv., 689 F.2d 1112, 1120-21 (1st Cir. 1982). In *Cheshire Hospital*, the court rejected the retroactivity claim. Cheshire asserted that it had relied on a "clear, unambiguous and settled understanding" of the meaning of the regulation. Proferred evi-

provision's meaning: the regulation does not suffer from facial vagueness or ambiguity, and subsequent events have not revealed indefiniteness.[158] It can be argued that the regulated person should still seek regulatory guidance. But that solution is impractical. When a complicated regulatory scheme with numerous regulatory provisions is involved, a person cannot be expected to seek guidance on the meaning of each and every provision. Such a requirement would be time consuming and burdensome. Rather, the burden of inquiry should apply only when circumstances suggest that the regulation's meaning is in doubt.[159]

Even when inquiry is appropriate, those who request guidance from an agency may not receive it. The agency may not respond, or it may fail to do so in a timely manner, leaving the regulated person to guess which interpretation the agency will adopt. That person has a significant chance of guessing incorrectly, especially if the regulation is vague or ambiguous, and the agency has vacillated regarding its meaning.[160] Ultimately, if the regulated person relies

---

dence included testimony of an accountant about the settled understanding of those in the industry and a letter from a fiscal intermediary which was in accord. Moreover, the agency did not issue its interpretation until several years later.

158 In the criminal area, the Supreme Court has recognized that judicial expansion of seemingly precise language can violate due process:

> [There is] a potentially greater deprivation of the right to fair notice . . . where the claim is that a statute precise on its face has been unforeseeably and retroactively expanded by judicial construction, than in the typical "void for vagueness" situation. When a statute on its face is vague or overbroad, it at least gives a potential defendant some notice, by virtue of this very characteristic, that a question may arise as to its coverage, and that it may be held to cover his contemplated conduct. When a statute on its face is narrow and precise, however, it lulls the potential defendant into a false sense of security, giving him no reason even to suspect that conduct clearly outside the scope of the statute as written will be retroactively brought within it by an act of judicial construction.

Bouie v. City of Columbia, 378 U.S. 347, 352 (1964). *See also* Pierce v. United States, 314 U.S. 306, 311 (1941); Cohen v. Katsaris, 530 F. Supp. 1092, 1095-97 (N.D. Fla. 1982).

159 Diebold, Inc. v. Marshall, 585 F.2d 1327, 1337 (6th Cir. 1978):

> Further, we are aware that a duty of inquiry may properly be imposed on those engaged in business enterprises, as they should be alert to the probability that their conduct is of interest to one or more administrative agencies. But, on the undisputed facts of this case, we are unable to see how such a duty of inquiry could have been triggered. Whether an employer looked to the language of the regulations or to industry practice, it would have been led to believe that press brakes had been specifically exempted from guarding requirements. To hold that in these circumstances the employer should nonetheless have been put on notice by a general guarding requirement which was applicable to all machines, and which made no mention of press brakes, would be to indulge a fiction having little relation to reality. "[G]reat caution should be used not to let fiction deny the fair play that can be secured only by a pretty close adhesion to fact." . . . Adhering to the facts here, we believe that the regulations were insufficient to warn employers that guarding of press brakes was required.

160 *See* J.L. Fonti Const. Co. v. OSHRC, 687 F.2d 853 (6th Cir. 1982) (The Commissioners had previously disagreed about the proper interpretation of a regulation, but later agreed. The court refused to allow the Commission to apply the agreed upon interpretation

on a fair interpretation, the courts should afford the individual some protection under the *Chenery* test.[161] Although it can be difficult to determine what constitutes a fair construction given that courts have no set principles which govern the interpretive process, several suggestions can be offered. The chosen interpretation should conform to the regulation's language[162] and expressed purpose.[163] In addition, the regulated person should take into account judicial and administrative precedent construing similar terms.[164]

Courts should be reluctant, even in the absence of administrative guidance, to allow regulated persons to rely on settled industry practice in interpreting a regulation. Although the regulated person may have little else to look to, relying on industry practice raises potential problems. These problems are evident in vagueness challenges raised against the Occupational Safety and Health Review Commission's protective equipment regulation.[165] The agency has decreed that this regulation should be interpreted according to whether "a reasonably prudent person familiar with the circumstances of the industry would have protected against this hazard."[166]

Some courts have held that this standard makes industry practice controlling when determining the meaning of a regulation, and have invalidated agency attempts to impose other interpretations.[167] Most courts, however, do not treat industry practice as controlling for fear that the industry as a whole may be undercomplying. Rather, they consider industry practice as merely one factor which bears on the vagueness question.[168] This approach is sound

---

retroactively because of the agency's prior vacillation, and because that vacillation had exacerbated the regulation's indefiniteness.).

161 *See, e.g.*, Standard Oil Co. v. Department of Energy, 596 F.2d 1029, 1065 (Temp. Emer. Ct. App. 1978); Diebold, Inc. v. Marshall, 585 F.2d 1327, 1337 (6th Cir. 1978). *But see* Local 900, Int'l Union of Elec., Radio and Mach. Workers v. NLRB, 727 F.2d 1184 (D.C. Cir. 1984).

162 *See An Overview*, *supra* note 12, at 708-09.

163 *Id.* at 694-99.

164 *Id.* at 708-28.

165 The regulation states that "protective equipment, including personal protective equipment . . . shall be provided, used and maintained . . . wherever it is necessary by reason of hazards of processes or environment." 29 C.F.R. § 1910.132(a) (1982).

166 Cape and Vineyard Div. of New Bedford Gas v. OSHRC, 512 F.2d 1148, 1152 (1st Cir. 1975) (citing National Realty & Contr. Co. v. OSHRC, 489 F.2d 1257, 1265 (D.C. Cir. 1973)).

167 *New Bedford Gas*, 512 F.2d at 1152. *See also* B & B Insulation, Inc. v. OSHRC, 583 F.2d 1364 (5th Cir. 1978).

168 Voegele Co. v. OSHRC, 625 F.2d 1075, 1076 (3rd Cir. 1980); General Dynamics v. OSHRC, 599 F.2d 453, 464 (1st Cir. 1979);

> No other circuit has adopted the Fifth Circuit test [adopted in *B & B Insulation* of treating industry practice as controlling in determining what a reasonable person would expect a regulation to mean]. Instead, other courts have evaluated the custom and practice of the industry as one aspect of the reasonable person test.

and should be used in determining retroactivity questions. When a regulation's meaning is uncertain, a court may consider settled industry practice in determining whether a person's interpretation is reasonable. Of course, the weight given to such a practice depends on whether it is consistent with the regulation's language and purpose, as well as with other indicia of administrative intent.

As the *Retail, Wholesale* factors[169] suggest, second impression interpretations are more likely to impinge on legitimate reliance interests than first impression interpretations.[170] When an agency issues an official interpretive ruling, those subject to the ruling are coerced into compliance unless they are willing to make an immediate legal challenge or adopt their own interpretation and face the possibility of an enforcement action. Thus, when an agency revokes its ruling and substitutes an inconsistent one, a significant possibility exists that the agency will upset legitimate expectations.[171]

Some regulatory schemes provide a remedy for the problem of second impression interpretations. For example, Congress in-

---

These courts have refused to limit the reasonable person test to the custom and practice of the industry because "[s]uch a standard would allow an entire industry to avoid liability by maintaining inadequate safety . . . ." We find this policy reason for not making industry standards determinative to be quite compelling.

Voegele Co., 625 F.2d at 1078; Jensen Const. Co. of Okla., Inc. v. OSHRC, 597 F.2d 246, 248 (10th Cir. 1979).

169 *See* text accompanying note 101 *supra*.

170 *See, e.g.*, Stewart Capital Corp. v. Andrus, 701 F.2d 846 (10th Cir. 1983); Pederson v. NLRB, 234 F.2d 417 (2d Cir. 1956). Although the *Pederson* case did not involve a regulatory interpretation, it provides a good illustration nonetheless. The NLRB has discretionary power to refuse to consider matters within its statutory jurisdiction. The Board asserted jurisdiction over petitioner's employer, and subpoenaed petitioner to testify in a pending matter. Later, the employer fired petitioner for his testimony. Petitioner filed an unfair labor practice charge, but the Board dismissed the charge based on a policy decision not to accept jurisdiction over companies such as the petitioner's employer. The Second Circuit reversed, noting that the Board originally asserted jurisdiction and forced petitioner to testify, and therefore was obligated to protect him against retaliatory action. *See also* NLRB v. Atkinson, 195 F.2d 141 (9th Cir. 1952) (The NLRB had previously refused jurisdiction over matters involving the building and trade industry. The Board changed its policy and asserted jurisdiction over appellee who was involved in that industry, charging it with an unfair labor practice. The Ninth Circuit refused to assert jurisdiction retroactively.); K. DAVIS, *supra* note 25, § 7.23, at 116; Griswold, *supra* note 13, at 413-14; *The Deference Rule*, *supra* note 12, at 620-22.

171 *See, e.g.*, Stewart Capital Corp. v. Andrus, 701 F.2d 846 (10th Cir. 1983); McDonald v. Watt, 653 F.2d 1035 (5th Cir. 1981); Runnells v. Andrus, 484 F. Supp. 1234, 1238 (D. Utah 1980). These cases involved the Bureau of Land Management's oil and gas leasing regulations. Under those regulations, agents frequently submitted offers. For years, they were allowed to affix a client's signature with a rubber stamp. Then, in an adjudicative decision, the Bureau held that this practice was unacceptable. The Bureau decided that if an offer was signed by an agent or an attorney-in-fact, it must be accompanied by a signed statement setting forth the agency or attorney status. The Bureau applied the decision to previously submitted offers. All three Federal courts refused to sustain the Bureau's action.

cluded a good faith defense in the Truth-In-Lending Act.[172] This defense applies to interpretations of both the Act and the Federal Reserve Board's implementing regulations. Congress created the defense to encourage reliance on Board interpretations,[173] and to relieve those subject to the Act of the burden of choosing "between the Board's construction of the Act and [their] own assessment of how a court [would] interpret the Act."[174] Other regulatory schemes contain similar provisions[175] which provide an adequate solution to the problem.[176]

The Internal Revenue Service (IRS) has adopted guidelines which generally proscribe second impression interpretations. It created those guidelines even though it has been successful in applying later interpretations retroactively.[177] The IRS generally encourages reliance on revenue rulings, and has stated that, if such rulings are revoked, it will strive not to apply a new ruling retroactively.[178] Although private letter rulings may only be relied on by those to whom they are addressed,[179] others can protect themselves

172 *See* 15 U.S.C. § 1640(f) (1982).

173 *Id.*

174 *See* Ford Motor Credit Co. v. Milhollin, 444 U.S. 555, 566-67 (1980).

175 *See, e.g.*, section 10 of the Portal-to-Portal Act of 1947, 29 U.S.C. § 259(a) (1982), which provides that an employer shall not be liable for failure to pay wages required by the Davis-Bacon Act if he proves good-faith reliance on "any written administrative regulation, order, ruling, approval, or interpretation" of the Secretary.

176 One objection to the good faith defense is that it prevents retroactive effect regardless of the regulatory need for such effect. An agency can alter its interpretations prospectively. Once an agency issues an interpretive ruling, however, those who act in good faith reliance on that ruling are insulated from liability. However, if the agency really wants to make a retroactive change, it may be able to do so by amending the regulation to achieve the regulatory objective, and then applying the new regulation retroactively. Although this author has previously suggested that the good faith defense should be considered as a possible response to the problem of second impression interpretations, *see The Deference Rule*, *supra* note 12, at 616-17, it may not provide the best approach. Retroactivity analysis also seeks to protect those who have relied on existing interpretations, but has the advantage of permitting retroactivity when the regulatory interest is sufficient to overcome the reliance interest. Of course, some regulatory schemes may demand certainty and stability more than flexibility. The Truth-In-Lending Act is, in Congress' judgment, one of those schemes.

177 *See, e.g.*, Dixon v. United States, 381 U.S. 68, 74 (1965) ("The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law . . . but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute."). *See also* Manocchio v. Commissioner, 710 F.2d 1400, 1403 (9th Cir. 1983); Chock Full O'Nuts Corp. v. United States, 322 F. Supp. 772, 775-76 (S.D.N.Y 1971); Charbonnet v. United States, 320 F. Supp. 874, 878 (E.D. La. 1971). *But see* Elkins v. Commissioner, 81 T.C. 669, 679-81 (1983) (in a dispute about the proper interpretation of regulation the court noted that the regulation, as interpreted, could not be applied retroactively if there was "evidence of unconscionable injury or undue hardship suffered by the taxpayer in reliance on the erroneous position") (quoting Automobile Club v. Commissioner, 353 U.S. 180, 184 (1957)).

178 § 7.01(3) of Rev. Proc. 78-24, 1978-2 C.B. 503.

179 26 C.F.R. § 601.201(2) (1985) provides that a "taxpayer may not rely on an advance ruling issued to another taxpayer."

by requesting their own rulings.[180] If a ruling is obtained, it may generally be relied on[181] in present and future transactions.[182]

While the availability of a good faith defense may provide a remedy for the problem of second impression interpretations, not all regulatory schemes contain such a defense, and not all agencies have procedures like those used by the IRS.[183] In evaluating the effect of second impression interpretations under these other regulatory schemes, several guidelines can be suggested. As with first impression interpretations, a person's reliance on a second impression interpretation must be reasonable.[184] As a general rule, the reasonableness of that reliance should be presumed from the fact that the person has acted consistently with a ruling's language and purpose. The fact that administrative interpretations are not law and can be overruled by the courts should not be controlling.[185]

---

180 *See* 26 C.F.R. § 601.201(c) (1985).

181 26 C.F.R. § 601.201(1)(5) (1985) provides:

> Except in rare or unusual circumstances, the revocation or modification of a ruling will not be applied retroactively to the taxpayer for whom the ruling was issued or to a taxpayer whose liability was directly involved in the ruling if (1) there has been no misstatement or omission of material facts, (2) the facts developed later are not materially different from the facts on which the ruling was based, (3) there has been no change in the applicable law, (4) the ruling was originally issued with respect to a prospective or proposed transaction, and (5) the taxpayer directly involved in the ruling acted in good faith in reliance upon the ruling and the retroactive revocation would be to the taxpayer's detriment.

182 26 C.F.R. § 601.201(1)(6) (1985) provides:

> A ruling issued on a particular transaction represents a holding of the Service on that transaction only. However, the application of that ruling to the transaction will not be affected by the later issuing of regulations (either temporary or final), if the conditions specified in section 17.05 are met. If the ruling is later found to be in error or no longer in accord with the position of the Service, it will not give the taxpayer protection for a like transaction in the same or later year.

183 The Department of the Interior is another agency which does have such procedures. Its policies provide that it will not apply an overruling interpretation retroactively "when to do so would adversely affect actions taken and rights acquired by private persons on the faith of earlier decisions and would inure to the benefit of other private persons." Safarik v. Udall, 304 F.2d 944, 949 (D.C. Cir. 1962). Other agencies will, at times, mitigate the retroactive effect of their actions. *See* Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 76 HARV. L. REV. 921, 934 (1965).

184 Train v. Natural Resources Defense Council, Inc., 421 U.S. 60, 87 (1975) (the Court cites reliance by states subject to interpretation as justification for giving deference to that interpretation) (quoted with approval in E.I. du Pont de Nemours and Co. v. Train, 430 U.S. 112, 135 (1977)).

185 Algoma Plywood & Veneer Co. v. Wisconsin Employment Relations Bd., 336 U.S. 301, 327 (1949) (Black, J., dissenting) ("I would not make a trap of this settled administrative interpretation by subjecting this employer to penal damages for his good faith reliance on it."); NLRB v. Majestic Weaving Co., 355 F.2d 854, 860 (2d Cir. 1966):

> Although courts have not generally balked at allowing administrative agencies to apply a rule newly fashioned in an adjudicative proceeding to past conduct, a decision branding as 'unfair' conduct stamped 'fair' at the time a party acted, raises judicial hackles considerably more than a determination that merely brings within the agency's jurisdiction an employer previously left without . . . . And the hackles bristle still more when a financial penalty is assessed for action that might well

The legitimacy of reliance on an interpretation is enhanced if that interpretation has remained in effect for a substantial period of time without being modified, questioned, or overruled.[186] The courts have held that a person may legitimately assume that a long-standing, unquestioned interpretation is "correct" and worthy of reliance.[187] They have also emphasized that such interpretations should not be overturned lightly.[188]

Reliance is correspondingly less appropriate when the governing agency has warned against such reliance.[189] The agency can provide this warning either directly, such as when an interpretation is questioned or overruled, or indirectly, such as when the interpretation has been frequently modified.[190] These actions put the regu-

---

have been avoided if the agency's changed disposition had been earlier made known, or might even have been taken in express reliance on the standard previously established.

See also K. DAVIS, *supra* note 25, § 7.23, at 116 (retroactive change of settled law may produce unjust results).

186 *See, e.g.*, Mehta v. INS, 574 F.2d 701, 705 (2d Cir. 1978) (alleged reliance on prior administrative interpretation almost a year after the interpretation was revoked; the court held that the new interpretation could be retroactively applied). *See also* Traynor, *supra* note 21, at 547-48.

187 The Supreme Court has repeatedly emphasized that long-standing interpretations are entitled to greater deference. *See* Udall v. Tallman, 380 U.S. 1, 4 (1965) (the Court noted that the agency's interpretation was long-standing, and that others had relied on it, as a basis for giving deference); McLaren v. Fleischer, 257 U.S. 477, 480-81 (1921):

> If not the only reasonable construction of the act, [the agency's view] is at least an admissible one. It therefore comes within the rule that the practical construction given to an act of Congress, fairly susceptible of different constructions, by those charged with the duty of executing it is entitled to great respect and, if acted upon for a number of years, will not be disturbed except for cogent reasons.

See also Griswold, *supra* note 13, at 406-07, 408-09. Griswold states that:

> [W]hen a regulation is new, even though it is fairly contemporaneous with the statute, it is still in a sense on trial. In the immediate test of actual experience it may be found wanting, and it may be necessary to change it to fit conditions as they develop in actual fact. That, in large measure, is what we mean by administration. But after a while, and not a very long while, the probationary period should pass. A few years, at the most, should suffice. All of the arguments about reliance and certainty and predictability acquire new force. When a regulation has remained unchanged for many years, without contest or alteration, it seems obviously bad judicial tax administration to substitute the Court's construction of the statute for the administrative interpretation which has been relied on for so long a time.

Id. at 409.

188 Traynor points out in a perceptive discussion of whether courts should apply overruling precedent retroactively, that a "bad precedent is doubly evil because it has not only inflicted hardship but threatens to continue doing so." Traynor, *supra* note 21, at 540. *But see Prospective Overruling*, *supra* note 2, at 947.

189 *See* McDonald v. Watt, 653 F.2d 1035, 1042 (5th Cir. 1981) (retroactive application denied by the court when the interpretation was inconsistent with prior agency practice).

190 *See* C.H. Guenther & Sons, Inc. v. NLRB, 427 F.2d 983 (5th Cir.) (agency attempted to apply administrative precedent retroactively; using the *Chenery* balancing test, the court concluded that retroactive effect was permissible since the new decision had been foreshadowed by prior judicial and administrative precedent which had undercut the then existing

lated person on notice that the agency may depart from the interpretation, and therefore, that reliance may be inappropriate.

Even in this situation, however, reliance claims should not be summarily rejected. Although an agency's criticisms or modifications signal an interpretation's demise, those subject to the interpretation can never be sure that the overruling will in fact materialize. They also cannot be sure when the overruling will occur. Thus, although the regulated person may hedge his reliance on an interpretation, he must still respect it. Moreover, even though an agency may signal that it intends to overrule an interpretation,[191] it might not indicate which interpretation will replace it.

The legitimacy of a person's reliance on any interpretation depends, however, on the authoritativeness of that interpretation. Agencies issue interpretations in many different forms and at many different levels. Generally, the regulated person should only rely on interpretations which are institutional rather than individual in character.[192] Most agencies establish interpretations and rulings sections to insure that interpretive decisions are given careful and informed consideration. A person should be able to rely on these "official" interpretive rulings, but not on statements by low-level officials regarding their "interpretations."[193] If the regulated person could "rely" on the advice of low-level agency employees, he would have little incentive to use established interpretive processes.

Although an agency normally issues interpretive rulings through its legislative branch, it may also issue interpretations through its prosecutorial and adjudicative branches.[194] To the

---

precedent), *cert. denied*, 400 U.S. 942 (1970); American Mach. Corp. v. NLRB, 424 F.2d 1321, 1328 (5th Cir. 1970) (Rejecting assertions that agency's new decision came as a complete surprise, the court noted that the agency's prior decision "demonstrated the erosion of employers' freedom in treating jobless economic strikers as new applicants.").

The principles that apply to judicial decisions overruling prior precedent also apply to administrative interpretations:

> Although litigants may have actually relied on a prior rule in conducting their daily affairs, courts have generally not protected reliance when the overruled decision has been repeatedly weakened by cases that stopped short of explicitly overruling it or when the prior rule's abandonment has been clearly foreshadowed. In these situations, a litigant's claim that his reliance was justified becomes "weaker and weaker as the warning signs mount."

Prospective Application, *supra* note 24, at 478. *See also* Munzer, *supra* note 1, at 430-32; *Prospective Overruling*, *supra* note 2, at 947.

191 *See, e.g.*, Stewart Capital Corp. v. Andrus, 701 F.2d 846 (10th Cir. 1983).

192 *See* Pennzoil Co. v. Department of Energy, 680 F.2d 156, 171 (Temp. Emer. Ct. App. 1981), *cert. denied*, 459 U.S. 1190 (1983). *See also Contemporaneous Construction Discovery*, *supra* note 74, at 384-88.

193 *Pennzoil*, 680 F.2d at 171. *But see* Standard Oil Co. v. Department of Energy, 596 F.2d 1029, 1063-65 (Temp. Emer. Ct. App. 1978).

194 *See* McDonald v. Watt, 653 F.2d 1035, 1044-45 (5th Cir. 1981) (interpretations of an ambiguous regulation by the agency branch responsible for such matters were consistent with the plaintiff's interpretation; the court held that plaintiff's reliance was reasonable).

extent they involve a final decision by the agency, adjudicative interpretations can be deemed institutional in character.[195] Interpretations by the prosecutorial arm of the agency can also be relied on, at least until the adjudicative or legislative branch rejects them.[196]

Reliance is also more appropriate when the agency has encouraged it. *National Association of Independent Television Producers and Distributors v. FCC*[197] provides a good illustration. The case involved an amendment to a legislative rule rather than a regulatory interpretation. Through the prior rule, the agency sought to encourage independent producers by limiting the amount of prime time network programming.[198] The Federal Communications Commission (FCC) then revoked the rule, delaying the revocation for eight months. The Second Circuit refused to allow the revocation to take effect that soon, noting that the FCC encouraged independent producers to make greater investments under the new rule and that they could not recoup those investments in just eight months.

2. Regulatory Interest

The regulatory interest portion of the balancing test does not lend itself to precise rules or formulas. The regulatory interest will vary depending on the regulatory scheme involved and the nature and effect of the interpretation. Some situations will demand retroactive application,[199] while others may preclude it.[200]

---

195 *See Contemporaneous Construction Discovery, supra* note 74, at 387-88.

196 In Runnells v. Andrus, 484 F. Supp. 1234 (D. Utah 1980), the court denied retroactive effect because of a prior administrative practice on which the regulated person had relied.

197 502 F.2d 249 (2d Cir. 1974).

198 The Prime Time Access Rule prohibited network programming from occupying more than three or four prime time hours, depending on circumstances, during the day. During the remaining "local access hour," stations could not show feature films or off-network programming (reruns). Independent producers benefited from this rule because they produced the local programs.

199 *See* Laidlaw Corp. v. NLRB, 414 F.2d 99 (7th Cir. 1969), *cert. denied*, 397 U.S. 920 (1970).

200 *See* McDonald v. Watt, 653 F.2d 1035, 1045-46 (5th Cir. 1981). In *McDonald*, the court held that the public interest did not require retroactive application of an interpretation. The court noted that the only public interest implicated was that of insuring "equal access to leases through full disclosure." *Id.* at 1045. Plaintiffs' interpretation complied with the spirit of the Act by fully disclosing all interests in the lease. The court refused to apply the agency's interpretations retroactively since substantial harm would befall plaintiffs' interests. The court also noted that retroactive application might draw into question the validity of hundreds of leases already issued which could, in and of itself, be contrary to the public interest. In White v. Califano, 473 F. Supp. 503, 505-06 (S.D. W.Va. 1979), the court held that new disability rules could not be retroactively applied to the extent they were inconsistent with prior practice. The court noted that the governing Act, the Social Security Act, should be liberally construed to effectuate the Congressional mandate to provide disability payments to all qualifying persons. Retroactive application would be incon-

Most cases involving retroactive application will implicate some regulatory interest. Retroactivity frees the agency from the administrative inconvenience of simultaneously applying two different rules, one for prior transactions, and another for subsequent transactions. Retroactivity also allows the agency to implement its policy changes immediately.[201] These considerations, however, are not overriding. Inconvenience resulting from the existence of dual rules should not, by itself, sustain retroactivity. Only when the situation results in severe administrative problems should the administrative convenience argument justify retroactivity.[202]

The regulatory interest in applying an interpretation retroactively may be less compelling in several instances. One is when retroactive application will have broad, adverse consequences.[203] In *NLRB v. E & B Brewing Co.*,[204] prior National Labor Relations Board (NLRB) rulings upheld the validity of exclusive hiring hall contracts. When a later decision overruled that prior precedent, holding that exclusive contracts were invalid unless they carried three safeguards, the Sixth Circuit refused to give the new precedent retroactive effect.[205] The court was concerned, among other things, that retroactive application would invalidate numerous labor contracts nationwide.[206]

The regulatory interest will also be less compelling when an agency revokes an interpretation that has been in effect for a considerable period of time. As noted above, the longer an interpretation has been in effect, the more likely it is to generate reliance.[207] In such a situation, it is less likely that there will be a compelling need to apply a new interpretation retroactively. After all, if an agency advocates an interpretation for a substantial period of time, it is difficult for it to argue, absent significantly altered circumstances, that it has a compelling need to replace that interpretation immediately.[208]

Retroactive application might be justified, however, in several instances. The first is when an agency's interpretation is designed

---

sistent with that mandate. *See also* Stewart Capital Corp. v. Andrus, 701 F.2d 846 (10th Cir. 1983).

201 *See* Leedom v. International Bhd. of Elec. Workers, Local 108, 278 F.2d 237, 242-43 (D.C. Cir. 1960); Local 719, Int'l Prod., Serv. & Sales Employees Union v. McLeod, 183 F. Supp. 790, 793-94 (E.D.N.Y. 1960).

202 *See* cases cited at note 201 *supra*.

203 *See* McDonald v. Watt, 653 F.2d 1035, 1045-46 (5th Cir. 1981). *See also* Arizona Governing Comm. for Tax Deferred Annuity & Deferred Compensation Plans v. Norris, 463 U.S. 1073, 1106-07 (1983) (Powell, J., concurring in part, dissenting in part).

204 276 F.2d 594 (6th Cir. 1960), *cert. denied*, 366 U.S. 908 (1961).

205 *Id.* at 600-01.

206 *Id.* at 600.

207 *See* notes 190-91 *supra*.

208 *See* NLRB v. Majestic Weaving Co., 355 F.2d 854, 860-61 (2d Cir. 1966).

to eliminate a loophole which permits evasion of regulatory requirements. In this instance the regulated person's reliance on a prior interpretation is less legitimate and therefore less worthy of protection.[209] This is particularly true if the regulated person is aware of the loophole and is seeking to exploit it.[210]

Retroactive application might also be justified when an interpretation has a substantial impact on public health. In *Certified Color Industrial Commission v. Secretary of Health, Education and Welfare*,[211] the Food and Drug Administration (FDA) revoked its certification of

209 Adams Nursing Home of Williamstown, Inc. v. Mathews, 548 F.2d 1077 (1st Cir. 1977), *cert. denied*, 439 U.S. 1114 (1979), did not involve an interpretation of a regulation, but an application of the *Chenery* balancing test to an agency's attempt to apply a new substantive rule retroactively. The case involved the Medicare reimbursement scheme under which health care providers were entitled to reimbursement for their reasonable costs. Under those regulations, a provider could depreciate certain capital assets on an accelerated basis. This provision was subject to abuse because any provider that withdrew from the program early, after receiving its accelerated depreciation, had been reimbursed for more than its reasonable cost. The Department of Health, Education and Welfare, therefore, promulgated a later regulation allowing it to recover, from any provider who withdrew from the program, amounts received in excess of what would have been allowed had straight line depreciation been used. *Id.* at 1080-82.

Adams Nursing Home entered the program before the recapture regulation was passed and withdrew afterward. The Department used the regulation to recapture payments made prior to the passage of the regulation. The court determined that Adams' claim that it relied on the prior state of the law was not compelling:

> The rule has a greater impact on the expectations of those who planned from the start to take advantage of accelerated depreciation by quitting the program while they were still ahead. . . . While such an expectation may not be wholly illegitimate, it would seem to have nothing to recommend it other than the traditional desire to take advantage of a loophole.

548 F.2d at 1081. The court also emphasized that the agency had reserved the right to make retroactive changes as necessary. *Id. But see* Daughters of Miriam Center for the Aged v. Mathews, 590 F.2d 1250 (3d Cir. 1978).

210 *See, e.g.*, Laidlaw Corp. v. NLRB, 414 F.2d 99 (7th Cir. 1969), *cert. denied*, 397 U.S. 920 (1970), which involved administrative precedent. Laidlaw sought to break a union by refusing to offer reinstatement to strikers who had been permanently replaced. Under prior Board precedent, this action was permissible. But a later decision required employers to reinstate replaced strikers as positions became available. That decision was applied retroactively to Laidlaw. Moreover, Laidlaw was ordered to give backpay to employees denied reinstatement. The employer's motive, of trying to break the union by punishing those who went out on strike, played a significant role in the court's decision. The statutory interest in protecting employees who exercise their right to strike was also important. *Id.* at 107.

The same precedent was not applied retroactively in Retail, Wholesale and Dep't Store Union v. NLRB, 466 F.2d 380, 391-92 (D.C. Cir. 1972). In that case, no evidence was introduced to demonstrate that the employer acted with a discriminatory motive. It initially refused to offer reinstatement based on prior precedent. When the later precedent was announced, the company voluntarily applied the precedent retroactively and began rehiring displaced strikers as positions became available. No backpay order was rendered. *See also* Daughters of Miriam Center for the Aged v. Mathews, 590 F.2d 1250, 1260 (3rd Cir. 1978) (Retroactive rules designed to cure defects in regulatory schemes, such as the Medicare program, are often sustained because the "interest in the retroactive curing of such a defect in the administration of government outweighs the individual's interest in benefitting from the defect.") (quoting from Hochman, *supra* note 2, at 705-06).

211 283 F.2d 622 (2d Cir. 1960).

certain food additives. This revocation rendered all products made with that additive "adulterated," thereby precluding their resale. The court justified its decision to apply the revocation retroactively on the "imperative" of public health.[212]

The appropriateness of retroactivity will, however, be affected by the nature of the remedy being sought. Injunctive relief may be appropriate when a significant regulatory interest is affected. In the *Certified Color* case, the agency did not seek injunctive relief, but its action precluded future use of an adulterated product. This remedy was the only one that would adequately protect the public health.

It will be more difficult to justify retroactivity when penalties are sought.[213] In the regulatory area, penalties are imposed for two reasons: to punish a violator for wrongful conduct, and to deter him, as well as others, from committing similar violations in the future.[214] Retroactive application of an interpretation may not further either of those objectives. Unless the violator has notice of regulatory requirements and an opportunity to conform his conduct to those requirements, punishment is not justified and there is no possibility of deterrence. In the instance of a retroactive interpretation, notice and the opportunity to conform one's conduct may or may not exist. If prior regulatory events clearly presaged the retroactive interpretation, then fair notice may have been given. But, if an initial interpretation is novel, or the agency has overruled a longstanding administrative interpretation, no such opportunity may have existed. Penalties can only be justified if, as in the case of an initial interpretation, the regulated person was negligent in failing to seek interpretive guidance.

Monetary awards might be justified for compensatory or restitutionary purposes. In *E.L. Wiegand Division v. NLRB*,[215] some of petitioner's employees were disabled and receiving sickness and accident benefits when a strike began. Under prior Board precedent, an employer could treat such employees as strikers and terminate their benefits.[216] In the *Wiegand* case, however, the Board overruled its prior precedent, holding that petitioner could not treat disabled

212 *Id.* at 626.

213 *See* Diebold, Inc. v. Marshall, 585 F.2d 1327, 1336 (6th Cir. 1978) (A regulatory interpretation may be applied prospectively. The court, however, refused retroactive application because penalties were involved, and the regulation did not provide fair notice of the regulatory requirements.). *See also* J.L. Foti Constr. Co. v. OSHRC, 687 F.2d 853 (6th Cir. 1982); Louis Vuitton S.A. v. Spencer Handbags Corp., 597 F. Supp. 1186 (E.D.N.Y. 1984). *But see* Laidlaw Corp. v. NLRB, 414 F.2d 99 (7th Cir. 1969), *cert. denied*, 397 U.S. 920 (1970).

214 *See* Louis Vuitton S.A. v. Spencer Handbags Corp., 597 F. Supp. 1186 (E.D.N.Y. 1984).

215 650 F.2d 463, 470-72 (3d Cir. 1981), *cert. denied*, 455 U.S. 949 (1982).

216 *Id.* at 471.

employees as strikers unless they manifested support for the strike. Moreover, the Board applied its new rule retroactively, notwithstanding the fact that petitioner had relied on the prior precedent.[217] The Third Circuit affirmed, noting that employers provided sickness benefits to employees based on their prior service. Thus, petitioner was obligated to pay such benefits, and would gain a windfall if it were allowed to escape that obligation.[218]

3. Deference

One relatively important, but as yet unanswered, question is whether an agency's decision to apply an interpretation retroactively should be entitled to deference. In a related context, commentators have criticized the courts for deferring to administrative interpretations of statutes or regulations.[219] It has been argued that this deference makes it difficult to challenge administrative action.[220] In the words of Senator Dale Bumpers of Arkansas, "[t]he cards have been hopelessly stacked against the regulated people in this country."[221] Deferring to an agency's decision to apply an interpretation retroactively may generate equal criticism.

The Supreme Court has not definitively resolved whether deference is required on retroactivity issues.[222] The lower courts have

217 *Id.* at 470-71.

218 *Id.* at 473-74.

219 *See* McGowan, *Congress, Court and Control of Delegated Power*, 77 COLUM. L. REV. 1119, 1164-68 (1977); Monaghan, *supra* note 70; O'Reilly, *Deference Makes A Difference: A Study of Impacts of the Bumpers Judicial Review Amendment*, 49 U. CIN. L. REV. 739 (1980); Woodward & Levin, *supra* note 70; *The Deference Rule*, *supra* note 12.

220 The Senate Committee on the Judiciary, in its report on The Regulatory Reform Act, stated:

> When a citizen challenges an agency's rule or order in the courts, the odds should not be stacked against him by judicial presumptions in favor of the agency. The judicially created doctrine of deference to agency interpretations of law, which some courts have elevated to a virtual presumption of correctness, places the bureaucratic thumb on the scales of justice, weighing them against the citizen. We intend this amendment to reestablish an equal balance.

S. REP. No. 24, 97th Cong., 1st Sess. 170 (1981).

221 125 CONG. REC. 23,481 (1979). Senator Bumpers proposed an amendment to the Administrative Procedure Act to eliminate the deference rule. S. 1080, 98th Cong., 1st Sess. (1985). The bill, especially the original version, was widely criticized. *See* McGowan, *supra* note 219, at 1164-68; Monaghan, *supra* note 70; Woodward & Levin, *supra* note 70; *The Deference Rule*, *supra* note 12, at 603-22. The amendment did not pass.

222 The Supreme Court's rhetoric on the subject is frequently inconsistent with its actions. At times, the Supreme Court stresses the importance of deferring to administrative interpretations. *See* Ford Motor Credit Co. v. Milhollin, 444 U.S. 555, 568 (1980) ("deference to the Federal Reserve [Board] is compelled by necessity; a court that tries to chart a true course to the Act's purpose embarks upon a voyage without a compass when it disregards the agency's views"). At other times, though, the Court can forget this important presumption even though it is pointed out by a fellow Justice. *See* United States v. Swank, 451 U.S. 571, 585-86 (1981) (White, J., dissenting):

> The Court today rejects the Internal Revenue Service's interpretation of §§ 611

taken inconsistent positions; some have held that deference is required,[223] and others have held that it is not required.[224] The Supreme Court has ruled that if the responsible agency has not ruled on the retroactivity question, it should be allowed to do so.[225]

One can argue that courts should defer to agencies on retroactivity questions. Because the responsible agency should have more expertise, it should be better able to determine the regulatory interest in applying an interpretation retroactively. Agencies may be less sensitive, however, to the potential inequities in a given situation, and thus it may be desirable for the courts to maintain strong judicial oversight.[226] A court can maintain strong oversight and

---

and 613 and the applicable regulation . . . . My disagreement with the Court's opinion is simple. It is not our function to speculate on who deserves an allowance; our duty is to determine if the Service's interpretation is a reasonable one. Since in my view the construction of the statutory provisions and the attendant regulation is clearly acceptable, I dissent.

See also AFL-CIO v. American Petroleum Inst., 448 U.S. 607, 712 (1980) (Marshall, J., dissenting):

> The plurality ignores applicable canons of construction, apparently because it finds their existence inconvenient. But as we stated quite recently, the inquiry into statutory purposes should be "informed by an awareness that the regulation is entitled to deference unless it can be said not to be a reasoned and supportable interpretation of the Act." . . . Can it honestly be said that the Secretary's interpretation of the Act is "unreasoned" or "unsupportable"? . . . The plurality's disregard of these principles gives credence to the frequently voiced criticism that they are honored only when the Court finds itself in substantive agreement with the agency action at issue.

223 *See, e.g.*, Certainteed Corp. v. NLRB, 714 F.2d 1042, 1056 (11th Cir. 1983) ("Barring some extraordinary circumstance, this court will not disturb the purely administrative determination that giving retrospective or prospective effect to a policy change best effectuates the purposes of its governing act."). *See also* NLRB v. Chicago Marine Containers, Inc., 745 F.2d 493, 498-99 (7th Cir. 1984).

224 *See* Montgomery Ward & Co., Inc. v. FTC, 691 F.2d 1322, 1334 (9th Cir. 1982); Retail, Wholesale and Dep't Store Union v. NLRB, 466 F.2d 380, 390 (D.C. Cir. 1972) ("Which side of [the *Chenery* balancing test] preponderates is in each case a question of law, resolvable by reviewing courts with no overriding obligation of deference to the agency decision."); White v. Califano, 473 F. Supp. 503, 506 (S.D. W.Va. 1979) ("The decision whether to grant or deny retroactive force to newly adopted administrative rules is purely a question of law and as such a reviewing court is under no overriding obligation of deference to the agency decision."). *See also* McDonald v. Watt, 653 F.2d 1035, 1043-44 (5th Cir. 1981) (the court raised the issue, but failed to resolve it); Daughters of Miriam Center for the Aged v. Mathews, 590 F.2d 1250, 1258-59 (3d Cir. 1978) (the court refused to defer to the agency's decision to apply a new legislative rule retroactively).

225 *See, e.g.*, NLRB v. Food Store Employees Union, Local 347, 417 U.S. 1, 10 n.10 (1974) ("[A] court reviewing an agency decision following an intervening change of policy by the agency should remand to permit the agency to decide in the first instance whether giving the change retrospective effect will best effectuate the policies underlying the agency's governing act."). *See also* Certainteed Corp. v. NLRB, 714 F.2d 1042 (11th Cir. 1983); Blackman-Uhler Chem. Div., Synalloy Corp. v. NLRB, 561 F.2d 1118, 1119 (4th Cir. 1977) (the court remanded the case to the agency for it to determine whether the precedent should be retroactively applied). *See also* Corr, *supra* note 8, at 785.

226 *See* Daughters of Miriam Center for the Aged v. Mathews, 590 F.2d 1250, 1258-59 (3d Cir. 1978). The court stated:

> We noted that the administrative agency here has no particular expertise concern-

still accept the agency's conclusions if it finds them persuasive.[227]

IV. Conclusion

The notion that everyone is presumed to know the law, which is based on the maxim that ignorance of the law is no excuse, has become a fundamental tenet of this country's legal system.[228] But, this tenet cannot be fairly applied when the law is uncertain and unknown,[229] and can perpetrate unfairness when novel or unanticipated regulatory interpretations are applied retroactively to the detriment of legitimate reliance interests. Nonetheless, courts apply regulatory interpretations retroactively even though the regulated person did not have fair notice of such interpretations at the time he acted. Courts have done so even though the agency which issued the interpretation was previously uncertain about the proper meaning of the regulation, and even though the agency may have previously construed the regulation differently.

In recent years, courts have been more sensitive to the retroactive effect of regulatory interpretations. Unfortunately, as in many other areas of the law, the courts analyze the validity of such interpretations under conflicting principles: the declaratory theory, retroactivity, estoppel, and vagueness. The courts also allow litigants to use an interpretation's retroactive effect as a basis for invalidating interpretations. Because courts utilize such diverse approaches,

---

ing the issue of retroactivity. To the contrary, the extent to which retroactive effect may be given to a promulgation is governed by principles of law that have been developed and refined by the courts, primarily in the context of constitutional adjudication.

Id. at 1259.

227 In reviewing administrative interpretation of statutes, courts apply a similar standard. *See, e.g.*, Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944). *Accord* Chrysler Corp. v. Brown, 441 U.S. 281, 315 (1979); Morton v. Ruiz, 415 U.S. 199, 237 (1974); Office of Consumers' Counsel v. FERC, 655 F.2d 1132, 1141 (D.C. Cir. 1980). *See also* Woodward & Levin, *supra* note 70, at 332-35. Moreover, courts seem willing to defer to considered agency conclusions on retroactivity issues. *See, e.g.*, Daughters of Miriam Center for the Aged v. Mathews, 590 F.2d 1250, 1258-59 (3d Cir. 1978) (the court decided to exercise "independent judgment" on the retroactivity issue, but it "searches" for the agency's reasons for its actions).

228 As Mr. Justice Holmes so aptly pointed out, "to admit the excuse [of ignorance of the law] at all would be to encourage ignorance where the lawmaker has determined to make men know and obey, and justice to the individual is rightly outweighed by the larger interests on the other side of the scales." O. HOLMES, THE COMMON LAW 48 (1881). *See also* 1 J. AUSTIN, LECTURES ON JURISPRUDENCE 498 (1869).

229 *See* C. SANDS, *supra* note 2, § 41.02, at 247:

> It is a fundamental principle of jurisprudence that retroactive application of new laws involves a high risk of being unfair. There is general consensus among all people that notice or warning of the rules that are to be applied to determine their affairs should be given in advance of the actions whose effects are to be judged by them. The hackneyed maxim that everyone is held to know the law, itself a principle of dubious wisdom, nevertheless presupposes that the law is at least susceptible of being known. But this is not possible as to law which has not yet been made.

there is no assurance that like cases will be treated in a similar manner. On the contrary, there is a significant likelihood that like cases will be treated inconsistently.

In the future, courts should use a three-step process in retroactivity cases. If an administrative interpretation is involved, they should evaluate it to make sure that it is valid and permissible. If the interpretation is valid, the courts should then analyze the underlying regulation to determine if it suffers from constitutionally impermissible levels of indefiniteness. If the regulation is sufficiently definite, the courts should then determine whether the interpretation should be applied only prospectively, or whether it should also be applied retroactively.

Resolution of the retroactivity question should involve, as suggested by *Chenery*,[230] a balancing of the "ill effect" of retroactivity against the regulatory interest in applying the new interpretation retroactively. Expanding their current analysis, courts should consider not only whether a person's expectations have been defeated, but also whether those expectations are legitimate. Expectations that are not legitimate should not be given much weight in the balancing test. Finally, the courts need to carefully scrutinize the regulatory interest implicated when they apply an interpretation retroactively.

230 332 U.S. 194, 203 (1947).